CONTEMPORARY ISSUES IN TAX RESEARCH [VOLUME 4]

edited by Adrian Sawyer, Lynne Oats & David Massey

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Contemporary Issues in Taxation Research

Volume 4

Adrian Sawyer, David Massey and Lynne Oats

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Dr Sara Closs-Davies is a Lecturer at Bangor Business School, Bangor University, UK, and after 15 years working as a tax advisor (CIOT) and qualified accountant (ACCA), she embarked on an academic career in 2008. She completed her PhD in accounting at Bangor University and has published in high-quality interdisciplinary accounting journals and presented at several conferences on taxation and accounting issues. Sara currently holds other key roles, including Chair of the British Accounting and Finance Association (BAFA), Interdisciplinary Perspectives Special Interest Group (IPSIG), External Examiner for several taxation modules and programmes for Manchester Metropolitan University and the University of Limerick. Sara's areas of teaching include international taxation, financial and management accounting. Her research and supervision interests include tax policy, administration, simplification and reform, welfare/benefit systems and taxpayer compliance. Sara has a particular interest in bridging the gap between, and adopting a pluralistic qualitative interdisciplinary approach toward, examining tax, accounting and public administration.

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David Massey

David Massey is in practice as a Chartered Tax Adviser (CTA). He works in Preston where he is a lecturer in taxation at the University of Central Lancashire's School of Business and Enterprise. David delivers the introductory taxation module and oversees the North West Tax Clinic (NWTC). The NWTC is a student-led pro bono tax clinic helping individuals on low incomes. The NWTC is a partnership between the University of Central Lancashire, Lancaster University and the national charity, TaxAid. It is the first of its kind in the UK. In 2019, David co-organised the annual conference of the Tax Research Network which was hosted in Preston. Prior to joining UCLAN, David worked for the UK Inland Revenue (now known as HMRC).

Benita Mathew

Benita Mathew is a PhD researcher in Tax Law, working under the supervision of Dr Ira Lindsay and Dr Carla Bonina at the University of Surrey. Her research interests lie at the intersection of international tax policy, corporate taxation and digitalisation in business models. Her PhD project rethinks the role of digitalisation in aggressive tax avoidance and tax evasion. The benefits principle, the single tax principle and the single economic entity concept underpin the Cost-based Value Chain Analysis (CVCA) proposal that is presented in her thesis. Benita is an ACCA Affiliate, ACGP Affiliate from PwC Academy and an Advanced Level candidate for the ICAEW ACA. She holds an MSc in Accounting and Taxation from the University of Exeter and a BSc in Applied Accounting from Oxford Brookes University.

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Lynne Oats is a Professor of Taxation, University of Exeter Business School, where she was previously Deputy Director of the Tax Administration Research Centre. She worked at the Australian Taxation Office for 10 years and has been a tax academic in Australia and the UK for 31 years. Lynne's research interests centre on taxation as a social and institutional practice, embracing historical and contemporary tax policy both nationally and internationally. She has an interest in new initiatives in relations between large corporate taxpayers, tax advisers and tax authorities and was part of an EU funded research consortium, FairTax. Lynne plays an active role in the tax academic community and has served as a Commissioner on the Charity Tax Commission.

In addition to publishing numerous journal articles and book chapters, Lynne is Subject Editor (Accounting) *British Tax Review*, and has published widely in the accounting and taxation fields. She is co-author of *Taxation Policy and Practice, Principles of International Taxation and Accounting Principles for Tax Purposes*. Lynne's 2012 edited book *Taxation: A Fieldwork Research Handbook* contains contributions from tax scholars from across the globe.

Adrian Sawyer

Adrian Sawyer is a Professor of Taxation and previous Research Director for the University of Canterbury Business School. He holds a Doctor of Juridical Science (SJD) from the University of Virginia, and a masters and undergraduate degrees in accounting and law from the University of Canterbury. He is a FCA, FCPA (Australia), and barrister and solicitor of the High Court of New Zealand. Adrian is Chair of the Editors of the *New Zealand Journal of Taxation Law and Policy*. Adrian's research interests include tax administration, compliance, international taxation and tax policy. He has published numerous articles in international peer reviewed journals and book chapters with leading international publishers.

Helen Thornley

Following a career in practice, Helen Thornley has been a Technical Officer with the Association of Taxation Technicians (ATT) since 2017. The ATT is the leading professional body for those engaged in UK tax compliance and Helen works on policy and practical issues concerning current taxation. Her work includes responding to consultations, commenting on draft legislation and guidance and representing the ATT in meetings with the UK tax authorities. She is widely published on current tax matters and regularly quoted in the national press. Prior to joining the ATT, Helen worked in practice advising family businesses and high net worth individuals in the north of England. She is a Chartered Accountant, Chartered Tax Adviser and member of the Society of Trust and Estate Practitioners. Helen's research into the Women's Tax Resistance League was carried out as a self-funded, independent project.

Cristina Trenta

Cristina Trenta is an Associate Professor in Tax Law at Örebro University, Sweden. She holds a PhD in European Tax Law from the Alma Mater Studiorum University of Bologna, Italy and a second PhD in Commercial Law from Jönköping International Business School, Sweden. Her first doctoral dissertation was awarded the 2008 tax law thesis award by the European Commission and European Tax Law Professors Association. Cristina teaches and researches in the fields of tax law, and sustainability, digital technologies, and artificial intelligence, with a specific focus on their interplay in the development and upholding of human rights. She was the program director for the Legal Science Programme with International Approach at Örebro University between 2013 and 2017, and has served a three-year period as an appointed member in her personal capacity of the EU Commission's VAT Expert Group. Starting in 2020, she represents Örebro University's interests on the TOR/Skattenytt Foundation Board. In 2021 she has been appointed as a Member of the Expert Group to the EU Observatory on the Online Platform Economy by the European Commission. Cristina has previous longstanding professional experience as a tax court litigator for the Italian Tax administration.

1 Contemporary Issues in Taxation Research: An Overview

Adrian Sawyer, David Massey and Lynne Oats[1]

This book principally contains a collection of papers that have their origins in a Tax Research Network (TRN) conference paper, revised or extended, from the 2018 and 2019 TRN Conferences, hosted by the University of Birmingham and Preston University, respectively. The conferences were sponsored by the Chartered Institute of Taxation and ICAEW Charitable Trusts.

This book is the fourth volume in the series. The first volume was published in September 2003 by Routledge (both in print & eBook), under the editorship of Andy Lymer and David Salter. It contained 12 chapters largely drawing upon papers presented at the 2000 TRN Conference hosted by the University of Birmingham. Volume 2 was published in March 2016 by Fiscal Publications (both in print & eBook), with the editors being David Salter and Lynne Oats. Once again it contained 12 chapters, this time drawing upon papers presented at the 2013 TRN Conference hosted by the University of Exeter. The most recent contribution, Volume 3, was published in September 2018 by Fiscal Publications (both in print & eBook), under the editorship of Emer Mulligan & Lynne Oats. Similar to the earlier volumes, it contained 12 chapters, with the contributions drawing upon papers presented at the 2015 and 2016 TRN Conferences, hosted by Hull University and Roehampton University, respectively.

The current volume comprises eight chapters (including this overview), and is somewhat smaller than the earlier volumes. This is in part a consequence of the delay in finalising this volume, which has been

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made even more challenging by the continual pressure on academics to publish their work in highly ranked journals rather than in other formats such as book chapters. We are indebted to the current contributors who have supported this volume and shown considerable resilience and patience throughout the process. We sincerely hope this will not be the last volume in this series.

For those that are not familiar with the TRN, it is an interdisciplinary group of academics and practitioners from the UK and elsewhere with a shared commitment to pursuing and furthering academic research in taxation. The TRN held its first conference in 1991 and since then has gone from strength to strength, attracting scholars from all over the world. It now incorporates a tax education day, as part of its commitment to capacity building. It delivered its first entirely online conference (hosted by the University of Cambridge) in 2020 due to COVID-19 restrictions, and will run its 2021 conference (hosted by Aston University) in a blended format of online and face to face.

Recent developments in the UK and elsewhere have raised the profile of tax issues significantly, and in the case of the UK, this has brought to the surface concerns about underinvestment in tax as an area of academic research. This volume serves as a further reminder that tax research is, in fact, alive and well, if unfortunately, often lacking in visibility. Indeed, the diversity of the topics covered in the ensuing chapters includes contributions from both early stage/doctoral student researchers and more experienced researchers. This is a testament to a vibrant community of scholarship with wide ranging interests and approaches to tax research.

The chapters provide valuable insights into the rich diversity of contemporary tax research. They draw upon a variety of perspectives including law, anthropology, social and public policy, utilising a range of research methodologies. This volume should provide insights and inspiration for aspiring tax researchers and policy professionals alike.

In terms of overarching themes, the contributions offer a "smorgasbord of delights" which can be generally grouped into three broad themes. The first theme addresses gender issues and taxation. Helen Thornley's chapter explores the women's tax resistance movement in the UK, with board composition & tax aggressiveness in Spain the subject of Francesco Cortellese's empirical contribution. The third chapter within this grouping is Cristina Trenta's chapter examining the role of tax law in the support of Sustainable Development Goals with the European Consensus on Development.

The second broad thematic grouping comes within the broad sphere of tax administration. In the first chapter in this grouping, Lucy Bowe reviews Cooperative compliance from an Irish case study perspective. The second contribution is an empirical analysis of the UK Tax credits system by Sara Closs-Davies.

The third theme is broadly titled tax policy. The first contribution is Benita Mathew's examination of the application of a market-based approach to taxation in the digital era. The final chapter in this group and the book is a critique of Principles-based legislative drafting by Hans Gribnau and Sonja Dusarduij.

The following overview gives a flavour of the content of each of the ensuing chapters.

Helen Thornley observes that emerging from the Women's Freedom League in 1909, the Women's Tax Resistance League (the League) was a small unique part of the campaign for women's suffrage which focused on tax resistance as a form of protest. The League campaigned under the banner "No Vote, No Tax". This chapter reviews some of the resistance prior to the formation of the League in 1909, the League's most active years from 1909 to 1914, including some of the cases the League took, before concluding with a summary of the League's final years and cessation of activities in 1918 following the passing of the Representation of the People Act. The research presented here draws primarily on the League's archives, which are held at the Women's Library of the London School of Economics.

Francesco Cortellese considers whether the gender composition of the board of directors could have some relation with tax aggressiveness for a sample of public Spanish listed companies covering the 2011-2017 period. Using a fixed-effect models, he concludes that the panel data does not show any significant relation between female representation on the board of directors and tax aggressiveness.

Cristina Trenta investigates the role of taxation in the light of the evolution from the UN Millennium Development Goals (MDGs) to the UN Sustainable Development Goals (SDGs) in the current European tax law and development landscape, and in connection to the New European Consensus on Development. Somewhat pessimistically her chapter concludes that a substantive coherent approach that transforms declarations and intents into factual, concrete, unambiguous legislation in the field of taxation, reversing its accepted impact on gender equality and promoting overall sustainable development, is still not there. In the absence of concrete measures in support of gender equality, and without wide-spread political will to create gender responsive fiscal systems, she argues that sustainable development models will not succeed.

Lucy Bowe observes that tax administrations worldwide face similar challenges in improving taxpayer services, addressing non-compliance and reducing costs. This chapter discusses the Irish experience of Co-operative Compliance (CC), a tax administration initiative which is strongly supported by the OECD and has been implemented in over 30 tax jurisdictions to date. Drawing on Irish Revenue and OECD publications, public discourse and relevant scholarly work, this chapter reveals that, 15 years since its introduction in Ireland, the practical implementation of CC raises broader questions worthy of further research including the motivations of tax administrations in the selection and adoption of new schemes; the performance measurement and management systems employed to assess such initiatives; and the impact of CC on trust levels of taxpayers, advisers and Revenue. The author argues that a more in-depth review of Irish CC is required to enhance our understanding of programme specific challenges, motivations and outcomes, and also to provide a broader understanding of the multiple variables at play in the design, adoption, evaluation and amendment of any similar initiative in tax administrations.

Sara Closs-Davies' chapter contributes to conceptual and empirical understandings of tax administration in tax and public sector accounting research by analysing how accounting technologies enact relational power during encounters between tax authority (HMRC) workers and citizens. The chapter applies ethnographic and grounded theory methods to explore the experiences and encounters of tax credit claimants and HMRC workers to show how accounting influence the work practices of HMRC workers, through relational processes, ultimately (re) shaping claimants' subjectivities and financial outcomes. The findings suggest that some tax credit claimants are not financially better off and are perversely held responsible and accountable for overpayment problems, facilitated through their encounters with accounting technologies. The accounting technologies of the tax credit system dehumanise encounters between HMRC workers and claimants, transforming claimants into self-responsible individuals. These findings highlight how the tax credit system underlies the targeting of tax credit claimants and sustains a neo-liberal discourse of private responsibility for financial hardship through its accounting technologies and everyday relational practices.

Benita Mathew observes that taxable presence issues in the digital era have, in part, led to the consideration of a market-based approach to taxation. This chapter considers the extent to which the market-based approach to taxation resolves taxable presence issues that are caused or exacerbated by digitalisation. The chapter challenges 'economic allegiance' justifications between market-based activities and market jurisdictions. While the market-based approach is robust at merely indicating the presence of economic activity in the market jurisdiction, the author argues that it does not match the role of the market-based activity in proportion to the value chain as a whole. The analysis in this chapter questions the need for a market-based approach in international tax if it does not substantially resolve the issues that reform started out with. Therefore, the chapter concludes that the market-based approach should be reconsidered as a policy option if it is not sufficient in light of taxable presence issues and is not aligned with a holistic view of value creation.

Hans Gribnau and Sonja Dusarduij comment that tax complexity is a multi-faceted and pervasive phenomenon. Narrow, detailed drafting of the law is a particular manifestation of tax complexity. Tax systems have become dense thickets of often thorny rules – at the expense of transparency, certainty and equality. On the other hand, principles-based legislation is sometimes proposed as an alternative regulatory instrument to counter both the complexity of detailed tax drafting and tax avoidance. The authors elaborate on principles-based legislation, rule-based drafting, and two other drafting styles – legal fictions and standards. This is undertaken from the perspective of (legal) principles, as advocated by the legal philosopher Dworkin. These fundamental legal principles constitute a normative framework for legislation. Importantly, the authors comment that none of these drafting styles should be seen as a magic formula. Securing the integrity of tax law requires the legislature to balance these different legislative drafting styles. In practice, the legislature will have to aim for an optimal mix of these styles.

A final mention must be made of the geographical spread of the work presented here. The chapters draw upon the experiences of Ireland, Italy, The Netherlands, Spain and the UK. While this grouping is European-centric, many of the issues raised have wider relevance, which underscores the value of the TRN in bringing together tax scholars from Europe and around the world. Indeed, for the first time in the history of these volumes, one of the editors of this volume resides outside of the UK, which is a testament to the wide reach of the TRN.

We hope that these chapters will serve as inspiration for future research work. We must continue to celebrate, and make visible, the rich and diverse perspectives that can be brought to bear on tax issues, particularly in light of growing public interest in tax matters. Indeed, in a post-COVID world, nations and society generally are beginning to turn their attention to how governments will be able to 'repay' their borrowing. Economic growth is unlikely to be sufficient, placing the spotlight on taxation and how additional revenues may be found.

Finally, we would like to once again acknowledge and thank the contributors of these chapters for their commitment to this volume and for the considerable patience they have shown in its preparation and publication.

Adrian Sawyer, David Massey and Lynne Oats

2 No Vote, No Tax! The Women's Tax Resistance League from 1909 to 1918

Helen Thornley[1]

Abstract

Emerging from the Women's Freedom League in 1909, the Women's Tax Resistance League (the League) was a small and unique part of the campaign for women's suffrage. Focussing on tax resistance as a form of protest, the League campaigned under the banner "No Vote, No Tax". The League drew members from across the spectrum of militant suffragettes and constitutional suffragists, and a number of individuals connected with the League have been commemorated following the centenary of women's voting rights in 2018 on the plinth under Dame Millicent Fawcett's statue in Parliament Square. In addition to fighting for the vote, the League campaigned for the separate taxation of married couples, and sought to highlight the incompatibility of the Taxes Acts with the Married Women's Property Acts of the late 19th century. This chapter reviews some of the resistance prior to the formation of the League in 1909, the League's most active years from 1909 to 1914, including some of the cases the League took, before concluding with a summary of the League's final years and cessation of activities in 1918 following the passing of the Representation of the People Act. The research presented here draws primarily on the League's archives, which are held at the Women's Library of the London School of Economics. The author is very grateful to the Women's Library for allowing access to these archives.

1 Helen Thornley is an independent researcher and a technical officer at the Association of Taxation Technicians.

Celebrating 100 years of voting rights

2018 marked the centenary of the Representation of the People Act 1918, the Act which finally permitted some women the right to vote.[2]

One of the highlights of the centenary celebrations was the unveiling of a statue to Dame Millicent Fawcett in Parliament Square in April of that year, which the author attended in League colours and wearing a replica League badge.

The first woman commemorated in the square, Fawcett's statue recognises the work of *suffragists* who campaigned for the vote on constitutional grounds – Fawcett herself was President of the National Union of Women's Suffrage Societies (NUWSS) – as well as *suffragettes*. The work of the suffragists has often been overshadowed in the public consciousness by the sometimes violent exploits of the suffragettes of the Women's Social and Political Union (WSPU).

As a form of civil disobedience, tax resistance cut across the constitutional/militant divide and drew support from both suffragists and suffragettes, with the League claiming members from the NUWSS, WSPU, Women's Freedom League (WFL) as well as women writers, graduates and various church leagues (WTRL, c. 1913, p. 8).

In addition to Dame Fawcett herself, a further 55 women and four men are commemorated on the plinth beneath. Of those, eight have some connection to the League.

- Louisa Garett Anderson – hosted the League's first meeting
- Emily Wilding Davidson – applied for a job with the League
- Charlotte Despard – tax resister
- Laurence Housman – speaker for the League
- Edith How-Martyn – founding member of the League
- Dora Montefiore – early tax resister
- Adela Pankhurst – tax resister
- Princess Sophia Duleep Singh – tax resister

While the League was never a large organisation, it is pleasing to see some of those connected with it commemorated in such a public manner.

2 Full voting equality with men was not achieved until 1928.

A timeline of tax resistance

The idea that payment of tax should be linked to voting rights was not a new idea in the early 20th century – the phrase "taxation without representation is tyranny" dates from the American Revolution of the 1700s.

In order to set the formation of the League in context, this section looks at how earlier campaigners sought to highlight that the link between tax and voting rights had been broken for women in the UK.

The first petition

While much suffrage scholarship starts from 1866 (when the first mass petition was presented to Parliament demanding the vote) the first petition from any individual woman requesting the right to vote was presented over 30 years earlier on 3 August 1832 by Henry Hunt MP. The petitioner was Mary Smith, a wealthy widow from Stanmore, in the county of York, who specifically referenced in her demand for the vote the fact that she paid tax.

Chorlton v Lings

Mary Smith's petition was triggered by the specific exclusion of women from parliamentary voting rights by the 1832 Reform Act. This Act excluded women from voting by defining a voter as a 'male person'.

In 1867, the year after the first mass petition, a subsequent Reform Act changed the definition of a voter back to 'man'. Early suffrage campaigners saw this change as an opportunity to use the provisions of an intervening Act – the Interpretation Act 1850 – to get women on the register of voters. Under the Interpretation Act words importing the masculine gender were considered to include females unless it was specifically provided otherwise.

The case of *Chorlton v Lings* concerned the attempts of a number of women to be listed on the Parliamentary Register on the basis of the interaction of the updated wording of the Reform Act 1867 and the Interpretation Act. Fawcett included the case in her history of the suffrage movement, reporting that the case was lost when the Court decided that 'man' could not import 'woman' when a 'state privilege' such as voting was concerned (Fawcett, 1911, p. 7).

Even here, taxation was relevant, with Fawcett highlighting the implications for women taxpayers: "This judgement, therefore, established as law that 'the same words in the same Act of Parliament shall for the purpose of voting apply to men only, but for the purpose of taxation shall include women"' (Fawcett, 1911, pp. 7-8).

Fawcett further reported that *The Times* considered it a "dangerous doctrine that representation need not go along with taxation" (Fawcett, 1911, p. 8).

The Priestman Sisters and the first act of resistance

It is not until 1870 that the first actual act of tax resistance (as identified by the League) was carried out for the suffrage campaign, when sisters Anne and Mary Priestman resisted their taxes in protest at their lack of a vote (Parkes, c. 1920, pp. 1-2).

Active in the suffrage movement for some years, the sisters were Quakers and Crawford (1999, p. 566) describes their protest as "the Quaker weapon of passive resistance". Presumably tax resistance was a form of action that could be considered compatible with their faith. The result of the sisters' non-payment was that the authorities seized their dining room chairs and took them to auction to settle the debt. In fact, the chairs were never sold, but were instead returned after the tax was paid by what Kineton Parkes describes as an "interfering sympathiser" (Parkes, c. 1920, p. 1).

The sisters tried the same approach the following year, but again the tax was paid and their goods returned. Rather than oblige their anonymous donor to meet their tax burden again, the sisters decided not to resist the following year.

While this was an isolated stand it inspired others, and both sisters were said to have taken a great interest in the work of the League until their deaths in 1914 (Parkes, c. 1920, p. 2).

Miss Henrietta Müller

The next act of resistance recorded in the League's history was that of Miss Henrietta Müller of 58 Cadogan Place, London in 1884 (Parkes, c. 1920, p. 2).

In June 1884, Müller wrote to the *Pall Mall Gazette* to explain that she was refusing to pay tax because, while the Franchise Bill passing through Parliament that year was expected to add almost two million more men to the register, it made no provision for female voters (A Woman's Argument, 1884).

An active suffragist, Müller viewed her tax resistance as a "practical test of the sincerity" of her own words, having spoken in support of women's suffrage at many events in the previous five to six years. In an echo of the later "Deeds not Words" slogan of the WSPU, Müller wrote that "it is deeds that are effectual weapons and not words" (A Woman's Argument, 1884).

Overlooked in the League's account, but explained by Müller in her article, she was not alone in her resistance at that time. Miss Charlotte Babb (another Quaker) had been resisting since 1871 and claimed to have been sold up nine times, and another woman was known to have been resisting until her marriage[3] (A Woman's Argument, 1884).

Accordingly, Müller refused to pay her taxes and, when the bailiff called, barred the door against him – an act which required the bailiff to obtain a warrant to proceed.

While the authorities did gain access when she was out, Müller managed somehow to defer the actual removal of her goods, buying time to advertise the date of the distraint with handbills, placards and men with sandwich boards, in order to attract a crowd to witness the bailiff's return. When the date arrived, Miss Müller and Miss Babb spoke to those present, expressing their views that tax resistance could be a very effective weapon.

A wealthy, well-travelled woman who had been educated at Girton and was a member of the London School Board for Lambeth, Müller's actions were reported widely and the story syndicated from London to the *Edinburgh Evening News*, and regional papers such as *The Sunderland Daily Echo* and *The Leeds Mercury*.

The reports of her actions though were not generally favourable, with *The Leeds Mercury* reporting that "it is impossible to conceive a more foolish or more mistaken course" (Politics and Society, 1884).

3 See page 30 for an explanation of why tax resistance as a married woman was more challenging.

The siege of Montefiore

After Miss Müller's action, there was a gap of 20 years before the next resister recorded by the League – Mrs Dora Montefiore (Parkes, c. 1920, pp. 2-3).

Montefiore was another suffragist of long standing and she first resisted her taxes in 1904. The resistance resulted in distraint, with the bailiff seizing items of furniture and a lady's bicycle and taking them to auction. A sympathetic auctioneer allowed Montefiore to speak before the sale of her distrained goods (No Vote No Taxes, 1904).

Montefiore repeated the exercise in 1905, with largely the same, limited, result. By 1906 however, Montefiore had joined the WSPU. Her autobiography records that she discussed her actions with Theresa Billington and Annie Kenney and it was determined that, with the support of the WSPU, she would barricade herself in her house against the bailiff while the WSPU held protests outside. The hope was that this way her action would gain much more publicity and educate the public (Montefiore, 1925).

The 'siege of Montefiore' begin in May 1906 and lasted for six weeks, during which time Montefiore and her maid barred the doors against the bailiff. A banner "Women should vote for the laws they obey and the taxes they pay" was hung from the house, and daily meetings and demonstrations were held outside, with Montefiore lecturing on her constitutional resistance from the upstairs windows (Mrs Montefiore Defying the Tax Collector, 1906).

This time Montefiore's self-described 'publicity stunt' gained considerable attention, with her autobiography reporting the press staging food being passed over the garden wall, and the receipt of press notices from newspapers in the US and Europe (Montefiore, 1925).

While Montefiore's protest was, like earlier attempts, an isolated act of resistance, her efforts were much more successful in attracting publicity – presumably thanks to the combined effect of the support of a group like the WSPU and a siege of significant duration – and must have helped to demonstrate that tax resistance could be an effective form of protest.

The People's Budget and the Women's Freedom League

The Women's Freedom League

As Montefiore's resistance over 1904 to 1906 had escalated to a siege, so the nature of the wider campaign to enfranchise women was also changing.

While suffragists campaigning on legal, constitutional grounds had existed since the mid-1800s, the formation of the WSPU by Emmeline and Christabel Pankhurst in 1903 with their slogan "Deeds not Words" introduced militancy – and turned the campaign into a fight.

A few years in and not everyone in the WSPU was prepared to support the growing levels of violence espoused by the Pankhursts and their supporters. In 1907, around 70 to 80 of WSPU members (including Montefiore) broke away from this group to form the Women's Freedom League (WFL). Members of the WFL were prepared to be militant, but not violent, and human life, safety and private property were to be respected.

Accordingly, the WFL supported tax resistance as a form of passive, non-violent protest and a number of their members, including the President Charlotte Despard, resisted taxes during 1907 and 1908.

In February 1908, the WFL published a leaflet encouraging members to "protest against the tyranny involved by the taxation of vote-less women", and proposing the resistance of Income tax, Property Tax and Inhabited House Duty, noting that to date efforts had been made by isolated women (WFL, 1908).

The People's Budget

At the same time as the idea of tax resistance as a form of protest was taking root, taxation itself was also gaining attention on the wider political agenda.

In April 1909, the Liberal Chancellor of the Exchequer, David Lloyd George, presented his 'People's Budget' to Parliament. Proposing significant tax rises including introducing a supertax on high incomes, land taxes and increased death duties, it was highly controversial and the subject of a major constitutional stand off between the House of Commons and the House of Lords.

The result was that by the summer of 1909, not only did a number of members of the WFL have experience in the practicalities and challenges of tax resistance, but tax itself was high on the political agenda. Whether or not the wider, national interest in tax was a driving factor to encourage tax resistance, it was the case that supporting tax resisters was time-consuming and WFL resources were stretched.

Accordingly, the WFL began to consider setting up a separate group to promote this form of protest (Parkes, c. 1920, p. 4).

The formation of the League

A "Preliminary Meeting to consider Tax Resistance" was held Friday 22 October 1909, hosted by Dr Louisa Garrett Anderson at her premises on 114a Harley Street (*Minute Book vol. 1*, 1909-1913).

The purpose of the meeting was to discuss "organised resistance to taxation". The 20 women and one man recorded as attending were:

- Mrs M(argaret) W(ynne) Nevinson (Chair)
- Dr (Louisa) Garrett Anderson (Doctor)
- Mr Herbert Jacobs (founder of the Men's League for Women's Suffrage)
- Mrs (Mary) Sargant Florence (Artist)(C)
- Dr (Elizabeth) Wilks (Doctor)(C)
- Dr (Kate) Haslam (C)
- Dr (Winifred) Patch (C) (Doctor)
- Miss Cicily (Cicely) Hamilton (C) (Writer)
- Mrs (Edith) How-Martyn
- Miss (Clemence) Housman (Artist)
- Mrs (Bettina) Borrmann Wells
- Mrs (Ethel) Ayres Purdie (C) (Accountant)
- Miss Benett
- Miss Ansell
- Lady (Florence) Harberton
- Mrs (Anne) Cobden Sanderson (C)
- Mrs (Lilian) Hicks
- Miss Carr Shaw

- Miss (Sime) Seruya (C) (Actress)
- Mrs Kate Freeman
- Mrs Kineton Parkes (C)

All items in brackets are additions to the original minutes. Those marked with a (C) were appointed to the initial committee.

Since this group was intending to resist taxes, it was first necessary to pay taxes. While this did not mean that all of the attendees were wealthy, inevitably some of women present had independent means. Others were professional women including doctors, writers, artists and actresses.

Crucially, the founding members also included a professional accountant – Ethel Ayres Purdie – whose ability to advise on matters of taxation was subsequently very valuable to the League (see page 17).

At this preliminary meeting, two competing options were discussed. The first was a proposal to form a separate society, the second to have a separate committee but otherwise remain part of the WFL (*Minute Book vol. 1*, 1909-1913, 22.10.1909). During the discussion, four of the ladies present pledged a total of £100 if an independent group was formed.[4] The question was taken to a vote and the resolution to form a separate group was carried nine votes to six. The Women's Tax Resistance League was born.

The objectives of the League

In an early leaflet from circa 1910 titled "No Vote. No Tax", the League described itself as a "non-party Association of constitutional and militant Suffragists, recruited from all the various Suffrage Societies, for the purpose of resisting Imperial Taxation" (Purdie, c.1910a).

While the WTRL did not, according to Kineton Parkes, "hamper itself with any constitution" she did identify a number of objectives for the League which can be summarised as follows (Parkes, c. 1920, pp. 5-7):

- To enrol members prepared to resist payment of taxes until they gained the right to vote. Members would be required to pay an annual subscription.

4 The subscribers were Mrs Sargant Florence (£50), Dr Elizabeth Wilks (£25), Dr Kate Haslem (£20) and Miss Sime Seruya (£5).

- To promote the principle of tax resistance through the press.
- To provide members with free, expert advice throughout the process of resistance, and to speak to the Board of the Inland Revenue on behalf of members.
- To organise protest meetings at the sales of any members' goods and maximise the publicity of the actions of resisters.
- To protect from imprisonment any resisters who did not have goods which could be seized.
- To update MPs on cases of resistance and lobby for questions to be asked in the House.
- To study the impact of tax law on women and identify and challenge where any such laws may affect women unfairly.

Building on the efforts of earlier resisters, the main objective of the League was to pursue the publicity opportunities from the process of distraint. "Public protest" was its "raison d'être" (Parkes, c. 1920, p. 39).

Auctions of a resister's goods were a significant opportunity to win sympathy for the suffrage cause. Members would turn out in force to support the resister, make speeches and hand out leaflets explaining why the individual had failed to pay their taxes. Since resisters were otherwise law abiding and upstanding members of the community, their appearance at debtors' auctions would attract press attention.

But the list of objectives above show that the League also took seriously the wider impact of the tax system on women, particularly married women, and a good deal of effort was directed to the League's demand for the separate taxation of married couples.

The League secretary: Margaret Kineton Parkes

Much of the League's day to day work towards its objectives, from administration to speaking engagements, was carried out by the League's secretary Margaret Kineton Parkes (1865-1920).

Kineton Parkes was working for the WFL when the League formed and permission was obtained early on to allow her work for the new society (*Minute Book vol. 1*, 1909-1913, 29.10.1909). Initially seconded for a period of three months, she remained the League's secretary until it wound up in 1918.

Crawford reports how Kineton Parkes was separated from her husband and that presumably she needed the income for her work for the League to support herself and her two children (Crawford, 2014). She also occupied the League's flat when it became big enough to require premises.

As secretary, Kineton Parkes travelled the length and breadth of the country, with the minutes recording her speaking at public and private events not just in and around London, but also in Bath, Bristol, Leeds, Manchester, Liverpool, Scotland and Ireland. The League even produced a postcard of her speaking from the back of a wagon when the League joined the WSPU and other societies for a mass rally in Hyde Park on Sunday 14 July 1912 (WTRL, 1912).

In addition to speaking, Kineton Parkes managed the League's correspondence and, for some periods of the League's existence, additional staff including a typist and a office manager.[5] Kineton Parkes also wrote the history of the League's work, which the League published with its remaining funds when it wound up in 1918 (*Minute Book vol. 2*, 1913-1918, 5.7.18).

The League's tax expert: Ethel Ayres Purdie

Another key member of the League was founding member Ethel Ayres Purdie (1874-1923). Ayres Purdie was the first woman admitted to *any* professional accountancy body when she was admitted to the London Association of Accountants (LAA) in May 1909, a few months before the formation of the League (Walker, 2011, p. 79). Her professional accounting skills, together with knowledge and experience of personal tax, put the League in a position to offer tax advice to individual resisters.

That she was a member of a professional body at a time before most bodies were prepared to admit women,[6] was also relevant to the League. As Walker reports, such membership gave her rights of representation

5 On 2 June 1913, Kineton Parkes wrote to the well-known suffragette Emily Wilding Davidson returning her testimonials after she applied to work for the League. The letter is held in Davidson's papers at the Women's Library, LSE (7EWD/A/2/4). The League rejected her on the grounds that she was over-qualified for the vacancy they had. A few days later and Davidson was dead, having fallen under the King's Horse at the Derby. The League joined the throngs of suffragists and suffragettes at her funeral, marching behind a banner of John Hampden draped in purple (Parkes, c. 1920, p. 32).

6 It would be another 10 years before the Sex Disqualification (Removal) Act 1919 finally forced all professional bodies to admit women.

under the terms of the Revenue Act 1903 and allowed her to represent League members before the Special Commissioners of Income Tax, as she did in cases such as that of Dr Burns (see page 36) (Walker, 2011, p. 84).

On a practical level, the minutes show that Ayres Purdie attended committee meetings regularly and frequently hosted them at her offices. She also audited the League's accounts. She wrote or contributed to League pamphlets, researched specific tax queries, accompanied other committee members to meetings with the Inland Revenue at Somerset House and provided advice direct to members.

Ayres Purdie was particularly concerned about the taxation of married women, believing that husbands and wives should be taxed separately. A full account of Ayres Purdie's life and professional practice and suffrage work can be found in Stephen Walker's paper (Walker, 2011).

John Hampden and the Ship Money Case

The League liked to draw on examples of historical resistance in support of their arguments, one of which was the refusal by John Hampden to pay ship money.

The Ship Money Case

The medieval custom of ship money allowed a sovereign to demand from coastal areas either ships – or the money for ships – during times of war. In 1634, Charles I sought to help resolve some of his financial problems by levying ship money based on the prospect of war – rather than an actual war. The following year he demanded it not just from coastal towns but also inland counties.

The demands became increasingly unpopular and in 1636 Hampden refused to make full payment of his liability. He considered the tax was unconstitutional as it was being charged without the approval of Parliament and that taxes should be levied according to the rule of law, and by consent. The case went to court in 1637 but, after a six-month hearing, Hampden narrowly lost his case on the basis that the King had a divine right to levy the tax.

Despite the loss, Hampden was considered to have secured a moral victory, and after the case non-payment of the tax increased. Ship money was ultimately declared illegal by Parliament in 1641.

From the League's perspective, Hampden's position of resisting a tax which had not been approved by Parliament fitted well with their objectives, and provided an excellent precedent for their own actions.

Hampden and the League

In addition to referencing Hampden in some of their literature, the League sold photographs and postcards of Hampden's statute in the House of Commons, and made a clever reference to the ship money case in their logo.

Designed by Mary Sargant Florence (Crawford, 1999, p. 308) the League's logo featured a ship in cream and black riding a rough sea on a chestnut brown background, with "No Vote No Tax" printed around the edge. The ship image can be seen used on badges, notepaper,[7] on 'promise' or 'pledge' cards – small, postcard style objects containing messages from the League which members could personalise – and, naturally, on the menu card for the John Hampden Dinner in December 1911. Over 200 people attended the eight-course fundraising meal, dining on 'Vol au Vent à la Hampden' and 'Bombe Tax Resistance'.

On a number of occasions, the League campaigned in what they called 'Hampden county' – the county of Buckinghamshire. In 1911, they held a series of meetings between 5-19 July in Great Missenden, Wendover, Aylesbury, Chesham and Stoke Mandeville (*Minute Book vol. 1*, 1909-1913). They returned again in 1912, borrowing a member's property in Wendover as a base. The minutes also report many trips to Aylesbury to attend auctions of resisters' goods.

On 27 June 1912, the League attended the unveiling of a statute of Hampden in Aylesbury. Although the League was refused permission to join the official ceremony, 17 members held their own unofficial procession to lay a wreath on the statue afterwards. The crowd was supportive, cheering them as they did, and the League sold a lot of literature (WTRL, 1913, pp. 6-7).

7 This can be observed on letters from 1913 and 1914. The League first commissioned notepaper in May 1910 (Minute Book vol. 1, 1909-1913, 28.5.1910) but no examples were available to review.

1910: Building up to resistance

Although a small number of women in the WFL were already resisting their taxes, the League itself did not immediately advocate resistance. It was decided in early 1910 that those who had previously resisted could continue to do so, but that the League itself would take no action until it had amassed 500 members (*Minute Book vol. 1,* 1909- 1913, 25.2.1910). Presumably the idea was to seek safety in numbers, as the committee had previously discussed the serious consequences – including the potential for imprisonment – as a result of the actions that they were proposing (*Minute Book vol. 1,* 1909-1913, 8.11.1909). For much of 1910 therefore, the League's main focus was on attracting members. In addition to contacting other suffrage groups offering to speak, attending drawing room meetings, writing to the suffrage press and producing various leaflets, the League also sought and obtained interviews with prominent suffrage campaigners such as Mrs Pethick-Lawrence. The result of those efforts was that by July 1910, League membership had reached three figures, with 104 members signed up (*Minute Book vol. 1*, 1909-1913, 4.2.1910, 29.4.1910, 9.7.1910).

In July, the League took part in various demonstrations in support of the Conciliation Bill which, if passed, would have enfranchised some women householders. Funds were raised for a banner of John Hampden in black, white and grey. Designed by Mary Sargant Florence, it was ordered from the Suffrage Atelier (*Minute Book vol. 1*, 1909-1913, 6.5.1910). Thus equipped, the League was able to form its own section in demonstrations at Hyde Park and Trafalgar Square (*Minute Book vol. 1*, 1909-1913, 9.7.1910, 25.7.1910).

By mid-September, concerns were growing that the Conciliation Bill would not pass. The League decided that if the Bill fell it would abandon its membership target and start resistance immediately (*Minute Book vol. 1*, 1909-1913, 19.9.1910). An action plan was drawn up and, in October, the League announced its intentions to both the suffrage and general press. The League's scrapbook contains a record of *The Times* (12.10.1910) reporting the League's request for members to sign up to tax resistance if the Conciliation Bill did not pass, and highlighting that such action could result in the seizure of goods or imprisonment.

By the end of October, matters had progressed such that a conference was needed to agree the conditions for tax resistance and the League's first annual conference was duly held on 14 November 1910 (*Minute Book vol. 1*, 1909-1913, 28.10.1910).

At the conference it was proposed that there should be two levels of membership – those capable of immediate resistance and those who were prepared to resist once the original target of 500 members had been achieved (*Minute Book vol. 1*, 1909-1913, 14.11.1910). While the minutes are unclear on the outcome of this resolution, Kineton Parkes reports (Parkes, c. 1920, p. 9) that the proposal was agreed to. Resistance in earnest was now imminent.

Funds were sought to enable the League to acquire an office and shortly afterwards a flat in 10 Talbot House, 98 St Martins Lane was acquired, signed for by Dr Elizabeth Wilks and the intended occupant, Mrs Kineton Parkes (*Minute Book vol. 1*, 1909-1913, 18.11.1910).

On 18 November 1910, Parliament was dissolved and, as a consequence, the Conciliation Bill fell. It was time for the League to begin resistance in earnest.

Organised resistance

The Imperial Taxes

The League encouraged members to resist what were called the 'Imperial' or 'King's' taxes, as these taxes were controlled by Parliament. League members were asked to pay local taxes such as the poor rate or water rate because women had voting rights at a municipal level (WTRL, c. 1913, p. 2).

The Imperial taxes included:

- Income tax
- Property tax
- Land tax
- Inhabited House Duty
- Licences:
  - Carriage licences
  - Motor licences

    - Dog licences
    - Armorial bearings
    - Male servants
    - Gun and game licences
- National Insurance
- Death Duties

All of the above are direct taxes, as it was not practical to resist indirect taxes such as duties imposed on goods. Adopting a principle of refusing to pay duties by not buying certain goods (for example, tea) was likely to generate little or no publicity, while causing great personal inconvenience to the resister.

The League appreciated that not all women would be in a position to resist taxes. Many women either did not have sufficient income or assets to create a liability or were married, where resistance was more challenging. Those that could not resist were encouraged instead to lend moral and financial support to those who could (WTRL, c. 1913, p. 9).

The process of resistance

In 1913, the League published a pamphlet, *The A. B. C. of Tax Resistance*, setting out in detail all that the potential resister needed to know about the practicalities of the resistance process.

The first step was to simply ignore all demands for payment until distraint (the seizure of goods) was threatened. This could take many weeks, or even months. When the threat of "distraint in 10 days" was received, the resister was encouraged to explain their position to the tax collector – and warned that it was unlikely that sympathy would be forthcoming (WTRL, c. 1913, pp. 3-4). Distraint involved the bailiff seizing goods of sufficient value to cover the tax and costs of collection, which would then be taken to public auction.

While the League would provide advice at any stage, it was at the point of distraint, and the subsequent auction of the resister's goods, where the League would be most able to help. Resisters were asked to inform the League when auctions were due so that the League could provide speakers and arrange buying-in if required (see page 26).

Resisting licences

For those resisting licences the process above included an extra step. Before distraint was levied the resister would first be summoned to appear at the police court.

Resisters were advised to attend court and to use the opportunity to explain to the magistrate that their resistance was due to the lack of a vote. While some magistrates might be more sympathetic than others, the resister could expect to be fined, and members were advised to then refuse to pay the fine. At this point either distraint or imprisonment was possible (WTRL, c. 1913, p. 7).

While distraint was the most likely outcome, the minutes do contain examples of resisters who were imprisoned for failure to pay licences, such as Miss Mary Walters who refused to pay her dog licence (*Minute Book vol. 1*, 1909-1913, 11.4.1913). For some members, resistance of licences and appearance in court became an annual event, with the fines for repeat offenders increasing to such an extent that the League became concerned about excessive fines, and Ayres Purdie was asked to prepare a schedule of maximum possible fines (*Minute Book vol. 1*, 1909-1913, 9.5.1913).

Court appearances, particularly of otherwise law-abiding women, generated good publicity. Committee member Mrs Caroline Fagan for example was a regular resister of licences and appeared in court in October 1912 for failing to pay licences on her motor car, for the use of armorial bearings and for her man servant. She received a fine of over £12 and her case was reported in *The Daily Mail*, *The Standard* and the *Manchester Courier*.

If required, the League would attend the hearing with the resister, with Ayres Purdie representing a member at court on a least one occasion (*Minute Book vol. 1*, 1909-1913, 2.5.1913).

Princess Duleep Singh

A particularly notable resister of licences was prominent WSPU member, Princess Sofia Duleep Singh. One of the daughters of the Maharaja Duleep Singh, the last Maharaja of the Sikh Empire, she lived in a grace and favour residence at Hampton Court originally provided by Queen Victoria.

In 1911, the princess refused to pay her licences for five dogs, use of armorial bearings, her carriage and one male servant and was summoned to court. (A Princess's Ring, 1911) Prior to her appearance, the princess sought advice from the League, who recommended solicitor Mr Leon Castello to represent her in court (*Minute Book vol. 1*, 1909-1913, 26.5.1911). The Princess appeared in Court on 22 May 1911 and was fined £1 for each offence (Princess as Suffragist, 1911). Since she refused to pay the fine, a seven-stone diamond ring was seized from her home and auctioned. The League produced postcards advertising the sale and asking the recipient to attend the protest meeting afterwards.[8]

Fortunately for the princess her jewellery was bought back by a sympathiser of the League and returned to her (A Princess's Ring, 1911). As the Princess resisted payment of licences again in 1913, she was taken to court once more, this time for only two dogs, her carriage and a man servant (The Suffragists, 1913). The Princess represented herself and was again fined and suffered distraint (*Minute Book vol. 1*, 1909-1913, 9.1.1914).

The seizure of goods

Distraint was the goal of most resistance, with public auctions providing an opportunity to protest and attract publicity in a variety of different ways. During the peak years of the League's activities – 1913 to 1914 – there could be up to 10 sales a week.

In order to make a spectacle, resisters were encouraged to advertise the sale beforehand to attract a crowd. This could be done by printing and distributing leaflets (handbills), advertising in the local paper and, where possible, getting a paragraph explaining the reasons behind the resister's actions included (WTRL, c. 1913, pp. 5-6). In April 1913, the minutes record agreement to the purchase of a megaphone, to prevent speakers being drowned out at auctions (*Minute Book vol. 1*, 1909-1913, 11.4.1913).

The committee regularly discussed forthcoming sales and, wherever possible, the League would send a speaker and either the resister themselves or another League member would attempt to speak before the resister's goods were auctioned. Ideally, the auction would be followed by a protest meeting in the vicinity.

8 Postcard held at the Women's Library, LSE, object reference TWL.2002.638.

In November 1974, WTRL member Marie Lawson was interviewed about her experiences of having goods sold (Lawson, 1974). She reported that:

> "Our sales were such a burden to him [the auctioneer] year after year, with the whole place crowded out with angry suffragettes demanding his blood almost. In the end he said he wouldn't do it anymore and the tax inspector couldn't get anybody to take them [debtors auctions] on because they were so annoyed by having so many suffragettes howling around the premises and holding protests instead and out."

Auction costs

The value of goods seized had to cover both the amount of tax owed and the costs of sale. While these costs varied, the League identified the following costs in "ordinary cases" (WTRL, c. 1913, pp. 4-5).

- Levy fee, 3*s*. 6*d*.
- Bailiff's fee, 2*s*. 6*d*.
- Auctioneer's commission, 7.5%
- Carriage costs

Resisters might also be charged with valuation and advertising in certain circumstances.

Carriage costs were charged to cover the cost of transporting large and bulky goods to auction. To minimise these costs, the League recommended that resisters should allow jewellery or plates to be seized. The items seized from resisters varied greatly, ranging from a silver cup (Duchess of Bedford's Tax Resistance, 1913), to furniture (Suffragette's Effect Sold by Auction, 1912), a Rembrandt (Arbroath Suffragette Refuses to Pay the King's Taxes, 1912) and even a cow, which promptly escaped – twice.[9]

9 Two undated, unattributed newspaper clippings in the League's archives report that the cow belonged to a Miss Lelacheur and had been seized from Lovegrove Farm, Checkendon and taken to Henley Market where, having been captured for the second time, it was finally sold for £10 12s. 6d (almost twice the tax due) to Mr Abel Dell of Marlow Bottom Farm, Marlow. A number of members of the League were present and a protest meeting was held afterwards.

Buying-in

Although distrained items were sent to public auction, resisters did not always lose their possessions. On a number of occasions friends and sympathisers would 'buy-in' distrained property to give back to the resister.

Buying in occurred, for example, at the sale of Princess Duleep Singh in 1911 noted above (and again in 1914 (Anand, 2015, p. 292)) and in the case of the Duchess of Bedford (Duchess of Bedford's Tax Resistance, 1913).

The practice was recorded in League minutes and in newspaper reports of auctions. The League participated in arrangements to buy in and on one occasion, where the League failed to arrange for the resister's goods to be bought back, the member resigned in protest (*Minute Book vol. 2*, 1913-1918, 13.7.1914).

While buying-in allowed non-resisting women to support their resisting sisters, there were some concerns that having goods bought in reduced the effectiveness of the protest. Although an early WFL leaflet in 1908 seeking resisters mentioned the potential for friends to buy goods back (WFL, 1908), the League's own *A.B.C of Tax Resistance* in 1913 makes no mention of this as an option. In 1914, Ayres Purdie suggested that it would be "bad policy" to highlight the practice (*Minute Book vol. 2*, 1913-1918, 31.7.1914). Presumably resisters needed to be seen to be genuinely risking their possessions for the cause.

(Wo)man the barricades

Before goods even reached the auction, another way of making a spectacle was to resist entry to the bailiffs. The League knew this to be an effective method to gain publicity based on the experience of Dora Montefiore, and the topic of barricades was raised at the League's second annual meeting in 1912. A number of women present at the meeting made suggestions or talked about their own experiences, and the League secretary reported that she had already had volunteers to bar the doors against the bailiffs (*Minute Book vol. 1*, 1909-1913, 7.2.1912).

By May 1912, Mrs Darent Harrison was reported as holding out against the tax collector in St. Leonards on Sea (*Minute Book vol. 1*, 1909-1913, 3.5.1912) and this, and a second barricade by Mrs Harvey in

Bromley, Kent featured in the League's Third Annual Report published in January 1913. Mrs Harrison held out the bailiffs for a month, with photos of her hauling up a basket of provisions making the local paper (Suffragette Provisioning, 1912), while Mrs Harvey was besieged from May to December – a period of almost eight months before the bailiff forced his way in via the garden gate (WTRL, 1913, pp. 14-15).

The results of their actions must have been considered worthwhile as both Mrs Harrison and Mrs Harvey barricaded themselves in again in 1913.

This time Mrs Harrison's siege was ended after only 10 days when the bailiff sneaked in to seize goods. The auction was set for 14 May and Mrs Harrison arranged for a demonstration involving local Hastings suffrage groups and a brass band. However, the crowds were not supportive, the demonstrators were attacked and a riot ensued in which the demonstrators had their clothes torn and a number of League flags and bands were destroyed (*Minute Book vol. 1*, 1909-1913, 16.5.1913; Parkes, c. 1920, p. 25).

In November 1913, a battering ram was used to gain entry to Mrs Harvey's property and finally end her siege which had again started in May (The Battering Ram, 1913). It would appear that for some of that period Mrs Harvey was actually in prison for resistance of National Insurance, in addition to her failure to pay Inhabited House Duty which had prompted the siege (Parkes, c. 1920, pp. 27-28).

The harder line taken by the authorities in 1913, and the violence experienced by the demonstrators in Hastings, may reflect the tougher stance that was being taken more generally against the violent actions of suffragettes at that time.

The Arrest of Clemence Housman

Not all acts of resistance by League members ended in distraint. As the League had discussed shortly after formation, imprisonment was a definite possibility (*Minute Book vol. 1*, 1909-1913, 8.11.1909) and during the life of the League both male and female resisters served time in jail. One such resister was Clemence Housman.

Clemence was an artist, engraver and writer and used her creative talents as a key part of the Suffrage Atelier, which designed and made many suffrage banners and advertisements, including for the League (Liddington, 2014, p. 45).

One of the younger siblings of poet A E Housman, Clemence lived with her brother Lawrence Housman for all of her adult life (Liddington, 2014, p. 41). Laurence also supported the women's suffrage movement and was a leading figure in the Men's League for Women's Suffrage. As a writer and noted speaker, he also lent his talents and pen to the League.

As a founding member of the League, and a committee member, Clemence wished to take part in resistance herself. But, as Liddington reports, in order to do so she first had to make herself liable to tax. Since presumably her income was too low to attract income tax, in 1909 Clemence took a house at Swanage and thus made herself liable to Inhabited House Duty (Liddington, 2014, pp. 68-69).

Liddington recites in detail (Liddington, 2014, pp. 204-206) how Clemence meticulously planned her resistance. Having taken a house, she then hired the furnishings, in order that the authorities would have no goods against which they could distrain.

Inhabited House Duty was levied annually on dwelling houses with a rental value in excess of £20. Presumably Clemence received, and failed to pay, demands for both 1909 and 1910. However, it was not until 1911 that the authorities began to take serious action against her and by July arrest was threatened (Liddington, 2014, p. 204).

Even the actual arrest took its time, with the League's minutes on Friday 29 September recording with glee "Miss Clemence Housman not arrested!", before going on to report that she had been arrested just before that day's committee meeting (*Minute Book vol. 1*, 1909- 1913, 29.9.1911).

Clemence's arrest had actually been expected on the Thursday and so a demonstration had been arranged with photographers present to capture the scene (Liddington, 2014, p. 204). The League's scrapbook includes a photo of Clemence, flanked by Laurence and Mrs Kineton Parkes and standing in front of a League banner while she awaited arrest. Arrest was serious manner – as a Crown Debt imprisonment for life was technically possible.

A clipping from *The Daily Express* in the League's archives dated 30 September reported (incorrectly, since other resisters had been imprisoned by that point) Clemence's arrest under the heading "The First Real Suffrage Martyr" and noted that she had also refused to pay for a taxi to prison. The paper observed that the fare of 4s. 6d, paid by the sheriff's officer was the exact figure as the unpaid tax. In another unattributed clipping, Laurence noted that the cost of Clemence's arrest and imprisonment was far in excess of the actual tax owed.

Following Clemence's arrest, the League sprang into action, immediately planning a protest meeting outside Holloway, and receiving an offer from the WSPU to organise a procession. Liddington reports that Clemence also protested from within Holloway, petitioning the Home Office and explaining her resistance (Liddington, 2014, p. 205). Her case reached Winston Churchill who was reported to be unsympathetic and in favour of a substantial sentence to deter others.

As reported in the *Yorkshire Daily Observer* on 7 October 1911, Clemence was envisaging a three-month term. Instead, she was unexpectedly released at midday on Friday 6 October after only a week. Her early release meant that Clemence was able to join the procession planned for that Saturday in her support.

The *Eastern Daily Press* reported on 9 October that the procession, which took place in a "pitiless downpour", was attended by around 500 members of the WSPU. Mrs Pankhurst (president of the WSPU), Mrs Despard (president of the WFL) and Clemence herself spoke to the crowds. Clemence was reported as saying that "when she reached Holloway Goal it seemed like a polling booth, in which she was to record her vote against the Government in the only way provided by Parliament for women".

That Clemence was released so quickly – and without having paid her taxes – was taken to be a great success by the League. Perhaps the authorities were concerned that she could have become a martyr. In fact, Clemence did not pay her taxes until 1917, when the passage of the Representation of the People Act was secured. However, her case illustrates one of the major problems with the practice of tax resistance – the sheer time it took for resistance to have an impact. Despite commencing resistance in late 1909, it was not until autumn of 1911 that the authorities finally took the action which resulted in publicity for the cause.

The taxation of married women

Most of the taxes resisted by the League were demanded annually and, as noted in the case of Clemence Housman, it often took a considerable time for the authorities to deal seriously with resisters. As a consequence, outside of the peak sale periods in the summer and autumn, members could look at other tax issues, and in particular how married women were treated by the taxation system. In 1912, the League formed a sub-committee specifically to deal with the subject of Married Women's Taxation (*Minute Book vol. 1*, 1909-1913, 8.11.1912).

The Income Tax Act 1842

The League had two specific concerns about the taxation of married women. The first of these concerned the language of the Income Tax Act 1842 (ITA 1842) which had reintroduced income tax under Robert Peel. Although over 60 years old by the time of the formation of the League, many of the provisions of the ITA 1842 were still in force, including the following in s 41:

> "And be it enacted, that the trustee, guardian, tutor, curator or committee of any person *being an infant or married woman, lunatic, idiot or insane* [emphasis added], and having the direction, control or management of the property or concern of such infant, married woman, lunatic, idiot or insane person, whether such infant or married woman, lunatic, idiot or insane person shall reside in Great Britain or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot or insane person were capable of acting for himself" (Paget, 1842, p. 26).

The educated, professional women of the League objected to be classified with "lunatics, idiots and the insane", viewing it as offensive and a legal humiliation.

Married Women's Property Acts

The League's second concern was how the ITA 1842 interacted – or rather failed to interact – with the Married Women's Property Acts. Under ITA 1842, the income of a married woman was taxable, but it was deemed to be her husband's for tax purposes, and he was the taxable entity per s 45:

> "And be it enacted, that any married woman acting as a sole trader by the custom of any city or place or other-wise, or having or being entitled to any property, or profits to her sole or separate use, shall be chargeable to such and the like duties and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried: *Provided always, that the profits of any married women living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee*." [emphasis added] (Paget, 1842, p. 27).

This provision meant that, in order to comply with his tax obligations, a husband needed his wife to provide all the details of her income to him. In turn, all assessments, demands and correspondence from the Revenue concerning their affairs were issued in the husband's name. The wife had no rights. As one Surveyor of Taxes told founding member Dr Elizbeth Wilks "Madam, for the purposes of taxation you, as a married woman, are non-existent" (WTRL, c. 1914, p. 5).

The problems arose because ITA 1842 pre-dated the Married Women's Property Acts of the late 1800s. When it was drafted, a husband and wife were one person under the law, and that person was the husband. Consequently, a woman lost any legal rights to property or income on marriage. From 1870 to 1893, a succession of Married Women's Property Acts gradually restored property rights to married women, eventually putting them on a par with single women.[10] However, the change in the legal status of married women was never reflected in tax law. The result was a clash between the Property Acts which gave married women rights over their income and assets, and the Income Tax Acts which did not acknowledge those rights for tax purposes.

Rebates

The clash between the property acts and taxes acts caused genuine hardship, particularly in situations where a married woman had some investments in her own name which generated income such as dividends or

10 In Scotland, similar though less extensive, acts were also introduced during this period and through into the 1920s.

interest. These were usually taxed at source but where too much tax had been deducted – perhaps because the deduction was at too high a rate, or abatements or allowances applied – then a wife had no way of reclaiming any overpayment on her income. Only the husband was entitled to claim the various allowances and abatements against their joint income and he could, if he chose, keep any rebate that arose, apply it against his own tax liability or simply refuse to claim it.

In a pamphlet published by the League, Ayres Purdie reported the case of a woman who had been forced to leave her husband due to his behaviour. She took the children with her and had no contact with the husband thereafter, bringing them up alone. However, each year until he died, he was able to recover the tax on her dividend income and retain it for himself (Purdie, c. 1910, p. 10).

Separate taxation

From this clash arose a number of further problems. The League considered that the law as it stood created a 'marriage penalty' because if both the husband and wife had their own income, depending on the level of that income, they could well be forced to pay more tax as a married couple than they did as separate individuals (WTRL, c. 1913a, p. 7).

The League also considered that the law was unfair to husbands because in order to make a complete return the husband needed information from his wife which he had no right to demand. ITA 1842 made no provision for a husband to obtain information from his wife because wives had no separate property rights when it was drafted.

In turn, the League considered it unfair that a wife should have to tell her husband her income in order to allow him to comply with tax law when there was no requirement for him to disclose the same information to her (WTRL, c. 1913a, pp. 8-9). The League felt that the only solution to these problems was to make husbands and wives taxable units in their own right and introduce separate taxation (WTRL, c. 1913a, p. 15).

Challenging the provisions of the Income Tax Act 1842

Part of the League's approach to demanding separate taxation involved demonstrating how the clash of the Taxes Acts and the Married Women's Property Acts made a mockery of the law.

The most aggressive line, set out by Ayres Purdie in a number of League leaflets, was to argue that, as the law stood, married women were simply not taxable at all (Purdie, c. 1910, p. 3; Purdie, c. 1913a; WTRL, c. 1910). As Ayres Purdie explained "the position of married women in relation to the direct annual taxes, such as Super Tax, Income Tax, Property Tax and Inhabited House Duty is a very simple one, and easily grasped. No married woman is liable for any of these taxes" (Purdie, c. 1910, p. 2). From this flowed her position that married women were not under the smallest obligation to co-operate with the Inland Revenue.

Ayres Purdie's justification for this position was based on her interpretation of s 45 ITA 1842. Since this section deemed a married woman's income to be her husband's and charged any tax in his name, in her view, married women were not "taxable units" and they should escape tax entirely.

The Mark Wilks Case

The case which demonstrates most clearly the effect of the clash between ITA 1842 and the Married Women's Property Acts – and which gained the League a great deal of publicity – is that of Mark Wilks.

Mark Wilks was the husband of Dr Elizabeth Wilks, one of the founding members of the League. Both earned their own incomes, Elizabeth as a doctor with her own practice in Hackney and Mark as a teacher for London County Council. Dr Wilks began her tax resistance in 1908, prior to the formation of the League, when she wrote "No Vote, No Tax" across her return (Wilks, c. 1912). That she received a notice in her own name in the first place is interesting. According to the provisions of s 45 ITA 1842, it should have been addressed to Mark. The authorities presumably estimated the tax due, as they eventually levied distraint on her goods.

Dr Wilks took the same action in 1909, with distraint again levied against her possessions (Wilks, c. 1912). In 1910, however, Dr Wilks took a different approach, informing the authorities that the return should be sent to Mark and not her. By then she would have met Ayres Purdie at League meetings, and it is tempting to assume that, through that connection, Dr Wilks became aware of Ayres Purdie's view that married women were not taxable under the law. This may have prompted Dr

Wilks to take legal advice on the matter, confirming that the distraint of 1908 and 1909 should not have been against her goods as she advised Lloyd George in 1913 (see page 38) (WTRL, c. 1914, p. 5).

Mark duly received a return, but informed the authorities that he could not complete it because he didn't know his wife's income and, thanks to the Married Women's Property Acts, she had no obligation to tell him (WTRL, c. 1913a, p. 2). Thus, began a back and forth between the Wilks's and Somerset House which was to go on for a further eighteen months. During that time, according to Dr Wilks, the authorities were unclear who to tax, making their claim "sometimes on me, sometimes on my husband, sometimes on us both conjointly, finally on him alone" (Wilks, c.1912).

By the summer of 1912, having settled that the liability fell on Mark, the Inland Revenue wrote and advised him that, as his return did not contain Dr Wilks's income, it was incomplete. Accordingly, they subjected him to the higher rate of tax on his income, in addition to the tax on hers, and demanded a sum in excess of £30. This was a significant amount for Mark as Dr Wilks's income was substantially more than his. He explained he had no means to pay but the Revenue rejected his arguments and threatened arrest (WTRL, c. 1913a, p. 3).

The first attempt to arrest Mark was made on 3 September 1912, and the League secretary recalled (*Minute Book vol. 1*, 1909-1913, 3.9.1912). A second attempt was made on 10 September, but no arrest was made as Mark was off work and in bed with a bad cold (Taylor Collection, *Captain Smithies Taylor* to WSPU, 18 Sept 1912).

By this point Dr Wilks's brother-in-law Captain Thomas Smithies Taylor was also involved.[11] On 11 September, he met with officials at Somerset House, following up with a letter on 14 September explaining that Mark had paid his share of the tax, and reiterating that he could not afford to pay the share arising on Dr Wilks's income, nor had he any rights to touch that income under the Married Women's Property Acts (Taylor collection, *Captain Smithies Taylor to WH Moonan, 14 September 1912*). The Revenue replied to reject that his letter reflected the points discussed (Taylor collection, *Mr Moonan to Captain Smithies*

11 His wife, Dr. Wilks's sister, Mary Ellen Taylor was also an active campaigner for women's suffrage who took part in window smashing of March 1912, and who had already been imprisoned and taken part in hunger strikes that year.

Taylor, 16 September 1912) and on Wednesday 18 September 1912, Mark was arrested (*Minute Book vol. 1*, 1909-1913, 18.9.12)

The League swung into action, holding a series of emergency meetings and sending over 600 letters to MPs on the day of his arrest. Three days later a protest meeting was held in Trafalgar Square, followed two days after that with a procession to Brixton where Mark was being held (*Minute Book vol. 1*, 1909-1913, 18.9.12). From within the prison, and with his job at risk, Mark petitioned the Chancellor of the Exchequer and the Commissioners of Inland Revenue for his release, (WTRL, c. 1913a, p. 3) while Dr Wilks petitioned the King, enclosing a leaflet explaining the case (Taylor collection, *Dr Wilks to King George V, 21 Sep 1912*). In Nottinghamshire, Captain Taylor wrote to his local MP (Taylor collection, *Captain Smithies Taylor to E Crawshay Williams MP, 20 Sep 1912*) and received a letter of support in return.

In the second week of Mark's imprisonment, a public meeting was held at Caxton Hall, the home of many suffrage protest meetings. George Bernard Shaw spoke, partly seriously to highlight the flaws in the law, and partly humorously about the risks to men of their wives withholding information and getting their husband's sent to jail saying "If my wife did that to me, the very moment I came out of prison I would get another wife" (Suffragist's Income Tax, 1912). The case was relevant to Bernard Shaw as he had been affected by a similar issue in respect of supertax and about which he had written to *The Times* in June 1910, calling for separate taxation of married couples.

Supertax was an additional income tax levy on income over £3,000 for those whose earnings were over £5,000. Bernard Shaw had a wealthy wife and had been required to return details of her income to be assessed to supertax for the first time in 1910 – information which he pointed out to the Revenue he did not have and could not force her to tell him. At Caxton Hall, he noted that while provisions had been made in 1911 to allow the authorities to assess a wife for supertax,[12] no such measures had been made for the general income tax affecting the likes of Mr and Dr Wilks.

12 The Revenue Act 1911 s 11 contained provisions that permitted the Special Commissions to require a return of income from the wife, if the husband had not made a satisfactory return.

Then, suddenly, after two weeks of imprisonment and with the tax still unpaid, Mark was released on 2 October 1912. From the perspective of the League this was a massive success and they celebrated the outcome with a special dinner in honour of Mark and Dr Wilks on 11 November (*Minute Book vol. 1*, 1909-1913, 22.11.12).

In addition to generating much publicity, the case reached the House of Lords, with Earl Russell speaking at length about the case – something which the League made much of in their literature (WTRL, c. 1913a) – although his concerns appeared to centre more around addressing the problem that husbands could be imprisoned at the whim of wealthy wives rather than separate taxation per se (HL Deb 14 October 1912 vol. 12 cc 823-34). Similar demands were made in the House of Commons where Chancellor Lloyd George confirmed he would look at the position and also that no further action was being taken against the Wilks following Mark's release (HC Deb 09 October 1912 vol 42 cc340-1).

For completeness, it should be noted that there is no evidence that Dr Wilks had wished her husband to be imprisoned through her actions, which was the concern Earl Russell sought to address. When speaking of the case to Lloyd George in 1913, she spoke of it being as much a grievance to a woman as a man "that a man should be put in prison and have to pay the penalty for what his wife has done" (WTRL, c. 1914, p. 6).

Living together or apart

Another significant case for the League in 1912 respect of married women's taxation also involved a doctor – Dr Alice Burn, Medical Inspector of Schools for the County of Durham (WTRL, 1913, p. 5). Originally from New Zealand, Dr Burn had moved to the UK to work, while her husband remained in New Zealand. Like Dr Wilks, she was refusing to pay her taxes on the grounds that, as a married woman, she was not liable to the tax, but here the Revenue could make no recourse to her husband as he did not live in the UK.

In July 1911, Ayres Purdie and two other committee members visited Somerset House to discuss her case (*Minute Book vol. 1*, 1909-1913). The following month, the Revenue wrote back to confirm their view that since Dr Burn and her husband lived in separate countries they could not be said to be living together, and Dr Burn was taxable on her income as a single woman (WTRL, 1913, p. 5).

Correspondence rumbled on, with the League's minutes recording the case ongoing in December 1911. In early 1912, with arrest being threatened, matters came to a head and Dr Burn appealed to the Income Tax Commissioners.

The appeal was finally heard in October 1912, with Dr Burn represented by Ayres Purdie. As previously noted, (see page 17) Ayres Purdie had rights of representation in front of the Commissioners as a member of a professional body. As Walker reports, Ayres Purdie's argument was that, although not living together *geographically*, they were living together in that they were not legally separated. Ayres Purdie also produced correspondence between the two to show they had not separated (Walker, 2011, pp. 90-91). Dr Burn was a married woman and it was offensive for the Revenue to suggest otherwise. The Commissioners were forced to agree and held that the liability did fall on Mr Burn who , residing as he did in New Zealand, was beyond the jurisdiction of the Crown (WTRL, 1913, p. 5).

Walker reports how Ayres Purdie went on to write up what he calls a "rather immodest account" of the outcome of the case in a three-act play called "A-Red Tape comedy" (Walker, 2011, p. 90).

Deputation to Lloyd George

The League also sought to make direct representations to Government on the separation taxation of married women. In February 1911, the League drew up a list of names of potential attendees for a deputation to Chancellor David Lloyd George. However, it took a significant amount of correspondence and it was not until 10 June 1913 that the meeting finally took place.

To this deputation the League took, quite literally in one case, their star performers:

- Mrs Lena Ashwell
- Dr Elizabeth Wilks
- Mrs Ethel Ayres Purdie
- Mrs Anne Cobden-Sanderson
- Miss Amy Hicks
- Mrs Caroline Frances Fagan
- Mrs Cecil Chapman

The deputation also included a shorthand writer so a published transcript of the meeting forms part of the League archives (WTRL, c. 1914).

After an opening address by Miss Hicks on the 'tax on marriage' – being the additional tax costs for married couples with two incomes – Mrs Lena Ashwell, actress and manager of the Kingsway Theatre, spoke about the indignities of receiving tax papers addressed to her husband, highlighting his ignorance of the business of a theatre.

Dr Wilks spoke about her case, using it to illustrate the clash between ITA 1842 and the Married Women's Property Acts and highlighting the injustices caused to both husbands and wives. Her concern was that it was more tax efficient to live in what she termed an 'irregular' manner. She also took the opportunity to correct Lloyd George on statements he had made about her case in the Commons which she considered to be incorrect.

Ayres Purdie followed, but there was perhaps a reason that, despite her professional tax expertise, she did not open the presentation. She proceeded to rapidly bamboozle Lloyd George with her examples of how the law operated unfairly on women with modest investment incomes.

In reply to the League's representations, Lloyd George agreed that it was a 'legal humiliation' that married women were treated as incapacitated by the Taxes Acts, and agreed that measures had been taken in with respect to separate assessments for supertax which had not been carried through to general income tax. However, he felt that it was correct to pool the household income of a husband and wife. The view of the Treasury was that separate taxation would cost the Exchequer in the region of £1.5 million a year and that was an amount he could not afford to lose. Whatever the justice of their cause, the costs of separate taxation and the challenges of redistributing the tax bill were simply too great.

Purdie v The King

Throughout the time that the League was seeking a deputation to the Chancellor, the League was also pursuing the idea of a test case to illustrate the incompatibility of the tax and property laws for married women.

Ayres Purdie initially suggested some possible cases in January 1911, but it was not until November 1912 that it was agreed to proceed. (Walker notes that the success of Ayres Purdie in the case of Dr Burns the previous month influenced the decision (Walker, 2011, p. 91).) The plan was to take a case to challenge the deduction of income tax at source from the investment income of a married woman on the grounds that, under s 45 ITA 1842, married women were not taxable units. Ayres Purdie was authorised by the committee to acquire some English stock and foreign bonds in her name and further empowered to spend up to £20 commencing the case (*Minute Book vol. 1*, 1909-1913, 22.11.1912, 29.1.1913).

In March 1913, Ayres Purdie reported to the committee that she had lodged a Petition of Right with the Home Secretary. She had been advised that it was not possible to directly sue the Crown for recovery of tax deducted at source and hence this unusual approach was required.

But again, matters seemed to stall, and in October 1913 it was decided that further proceedings should be postponed until the spring. The minutes do not say why this decision was made, only that a short report was sent to the press (*Minute Book vol. 2*, 1913-1918, 31.10.1913).

The case was picked up in 1914 and it was finally heard on 19 May 1914 (*Purdie v The King*, 1914). Ayres Purdie, representing herself, made the argument that while it might be correct for the company paying dividends to withhold tax from the dividends, since she was not a chargeable person under the Taxes Acts, she had a right to reclaim the withheld tax from the Crown. The burden of taxation fell on her husband and not her.

The Crown argued that there was a distinction between a personal assessment – to which s 45 applied and which had to be in the name of the husband as Ayres Purdie said – and the method of deduction to which s 45 simply did not apply. Furthermore, if her argument was right, all English companies would need to identify how many of their shareholders were married women before they could pay any dividends which was hardly practical. (*Purdie v The King*, 1914)

The judge agreed with the Crown, holding that Ayres Purdie's contention was "based upon a complete misapprehension". The first part of s 45 charged her as if she was unmarried, and the fact that tax was deducted at source was simply the mechanism of collection, it was not a charge in her name. The case was dismissed with costs (*Purdie v The King*, 1914).

While this outcome might have seemed a setback for the League, Walker reports that the decision received "favourable publicity" – both for Ayres Purdie herself and the subject of the case (Walker, 2011, p. 91). Ayres Purdie's efforts were therefore not in vain.

1914 to 1918: The final years of the League

England declared war

Although the loss of the test case must have been a disappointment for the League, it came at a time when other activities were in full swing. 1914 had got off to a good start, with a report of 165 new members admitted in 1913 – of which 52 were prepared to be resisters (*Minute Book vol. 2*, 1913-1918, 9.1.1914).

That spring and summer many resisters were 'sold up' at auction, a new leaflet on married women was produced, a new typist engaged, more lecture tours were planned for Yorkshire, Oxford and Ireland, and there was even the suggestion of engaging a paid organiser for the west of England (*Minute Book vol. 2*, 1913-1918). But all this activity came to a shuddering halt on Tuesday 4 August 1914, with the minutes recording in large letters: "England declared War" (*Minute Book vol. 2*, 1913-1918, 4.8.1914).

That Tuesday, the League secretary had held a meeting in Barnstaple, at which a number of new members had signed up.[13] The event was part of a speaking tour by Kineton Parkes which had started with two weeks in Ireland, before going via London to Oxford, then on to Western-super-Mare and down into the West Country. On receipt of the news of war, she headed straight back to London, leaving Ilfacombe at 7am the next day and finally returning at 8pm to call an urgent meeting (*Minute Book vol. 2*, 1913-1918).

A crisis meeting was held the following day, with just four members of the committee present, including Clemence Housman as chair. Action was immediate, with notice given to the League's two office staff and a

13 The note of 4 August recorded five new members, while the minutes of 6 August recorded that it was a drawing room meeting at which seven new members signed up.

decision to let the League's flat. Kineton Parkes was offered a month's salary, after which her position would be reviewed. She promptly offered to work for a nominal salary (*Minute Book vol. 2*, 1913-1918, 6.8.1914).

Initial administration completed, the League then had to make an important decision of principle – did League members continue to resist their taxes or to resume payment to support the war effort?

The decision was not an easy one to make, and a series of urgent meetings ensued. While some members felt that the League should both suspend activities and pay their taxes, others like Clemence Housman felt equally strongly against resuming payment, considering that "resisters should maintain their constitutional position" (*Minute Book vol. 2*, 1913-1918, 18.8.1914). Even the Inland Revenue got involved, with members including Marie Lawson (see page 25) reporting the receipt of letters urging them to pay at this time of crisis (*Minute Book vol. 2*, 1913-1918, 18.8.1914).

On 26 August, an extraordinary meeting of the League was called. Kineton Parkes reported that members were "sharply divided" with even members who had been imprisoned for tax resistance taking opposing positions in the debate (Parkes, c. 1920, p. 38).

The final vote in the room was exceedingly close, with the resolution to stop resisting tax carried by just one vote – 18 in favour and 17 against. When postal votes from those who could not attend were included, the position shifted more strongly in favour of cessation with 54 in favour of resuming payment and 31 votes against.

After that decision, winding down activities continued. Clemence Housman and Dr Winifred Patch, who had both been strongly in favour of continued resistance, stood down from the committee, Kineton Parkes received permission to work for the Women's Emergency Committee and Ethel Ayres Purdie was asked to audit a final balance sheet.

Members were informed of the committee's decision that activities should be suspended (although resistance of arrears could continue) by letter, and a testimonial was sought for Kineton Parkes (WTRL, 1914).

The war years

During the war years, with many members of the League involved in war work, a watching brief was kept by a few members of the committee. This small group met in March 1916 and again in February 1917. At the latter meeting Dr Winfred Patch, who was still resisting her taxes,[14] reported the bankruptcy proceedings ongoing against her (*Minute Book vol. 2*, 1913-1918, 13.2.1917).

The final meeting of the League was held on 5 July 1918 at Dr Gertrude Eaton's home in Kensington, a few months after the Representation of the People Act 1918 received royal assent. While the Act did not enfranchise all women, it would have enfranchised many of the League's supporters.

A small gathering of four attended, including founding members Dr Elizabeth Wilks and Mrs Cobden Sanderson. It was resolved to dissolve the League and use any remaining funds to publish Mrs Kineton Parkes' book on the work of the League. After that, it was a matter of finding homes for the remaining banners, minutes and press cuttings – many of which thankfully found their way in due course to the Women's Library at the LSE (*Minute Book vol. 2*, 1913-1918, 5.7.1918).

Beyond 1918: Independent taxation

While the League ceased to exist after the vote was won in 1918, married women were still considered to be chattels of their husbands for tax purposes, and Ethel Ayres Purdie and the WFL continued the fight for independent taxation.

In 1920, Walker reports that Ethel Ayres Purdie was invited to give evidence to a Royal Commission on Income Tax (Walker, 2011, p. 93). Representing the WFL, Ayres Purdie made a number of points in written evidence to the Commission, based on her claim of 12 years of practical tax experience (*Minutes of Evidence*, 1919, p. 329).

While by that time the ITA 1842 had been replaced by a new Income Tax Act 1918 (ITA 1918) which consolidated earlier acts, it still defined married women as "incapacitated persons" together with infants, lunatics, idiots or the insane, a position which Ayres Purdie considered

14 Further details of Dr Patch's ongoing resistance can be found at https://sniggle.net/TPL/index5.php?entry=02Mar11.

"the grossest insult". The new Act was also still inconsistent with the Married Women's Property Acts, which were by then over 40 years old (*Minutes of Evidence*, 1919, p. 329).

Ayres Purdie also highlighted that while the new Act did allow for husbands and wives to report income separately, one or other of the parties had to notify the Revenue six months in advance of the 6 May in the year of assessment, which was hardly practical – and impossible in the year that a woman married (*Minutes of Evidence*, 1919, p. 331).

In oral evidence Ayres Purdie was invited by the panel – on the grounds so few women had appeared – to make a brief statement to the Commission before they asked her questions. Initially she resisted this special treatment on the grounds that her statement was complete, before adding as a practical example of the issues she faced that the returns for her own employees were made out in the name of her husband.

While Ayres Purdie's written evidence was exceedingly clear, and evidenced her command both of the legislation and the extent of her practical experience, during questioning she soon made a statement fatal to her submission. She confirmed that she was, in fact, still resisting her taxes, claiming that she had "never yet made a return of my income and no tax has ever been paid upon it" (*Minutes of Evidence*, 1919, p. 332).

The Commission took a dim view, calling it evasion and devoting most of their questioning to trying – and failing – to understand Ayres Purdie's position that she *was* prepared to pay her tax, but only provided that she could be assessed separately from her husband. The panel first took convincing that Ayres Purdie's husband was not completing returns or paying taxes without her knowledge, before suggesting that she should have used the provisions to report separately to pay her taxes. To this Ayres Purdie objected that while reporting was separate, the assessment was joint. The panel then suggested that she should pay the income tax due to her husband so then he could pay it to the Revenue – to which Ayres Purdie replied that there was no law to compel her to do that. Her income was hers under the Married Women's Property Acts. For much of the oral evidence Ayres Purdie and the panel were therefore at odds, her admission having fatally undermined her credibility in their eyes.

As Walker reports, the Commission ultimately concluded that the aggregation of the wife's income with her husband's should continue (Walker, 2011, p. 93). It was not until 1990 that married women were finally separately assessed from their husbands.

Conclusion

It is difficult to conclude on the impact of the League. While it never achieved the 500 resisters that it initially aimed for, the League's history records 212 members as resisting their taxes (plus a further three names added by hand), some of whom resisted on more than one occasion (Parkes, c. 1920, pp. 42-44).

When you consider that this list is not a complete list of all who resisted tax for the vote,[15] – and that resistance was an act of civil disobedience which put resisters at risk of distraint and imprisonment – and given that the League only truly started to hit its stride in 1913 and 1914, a figure of over 200 individual resisters is not insignificant when compared to the figure of over 1,300 suffragettes listed as imprisoned from 1906 to 1914.[16]

The League's main goal was as a publicity machine, and the wide publicity it achieved is evidenced by the large scrapbook of press cuttings held in the League's archives. The League attracted too an impressive list of resisters and supporters including Princess Duleep Singh, the Duchess of Bedford, Louisa Garrett Anderson, Marie Stopes and Adela Pankhurst. League members also spoke on platforms including Emmeline Pankhurst and other prominent members of the WSPU.

While the attitude of the authorities did harden over time, even when the most severe step of imprisonment was imposed, the terms were of short duration and resisters such as Mark Wilks and Clemence Housman were released with their tax unpaid. Kineton Parkes even talks of the authorities leaving alone hardened resisters – threatening distraint but not carrying it out (Parkes, c. 1920, p. 35).

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15 For example, Captain Gonne who was imprisoned for refusing to pay Inhabited House Duty on behalf of his wife (Parkes, c. 1920, p. 28) is regularly mentioned in the League's minutes but is not included in the list, nor is Emma Sproson who went to prison for resisting her dog licences in 1911 (Crawford, 1999, p. 124).

16 Figure taken from the Suffragettes: Amnesty of August 1914: index of people arrested, 1906-1914. https://discovery.nationalarchives.gov.uk/details/r/C4769024.

The League was not just localised to London, but had sales as far north as Glasgow, Edinburgh and Arbroath, from Bristol to Kent, from Leeds to Liverpool, and the League secretary took the message of resistance all around England, Scotland and Ireland. The League also reached out overseas, with founding member Mrs Cobden Sanderson representing the League at the Sixth Congress of the International Women's Suffrage Alliance in Stockholm in 1910 (Parkes, c. 1920, p. 10) and at the International Woman Suffrage Allowance Conference in Budapest in 1913 (Parkes, c. 1920, p. 32). The League was technically skilled and beyond the auctions and propaganda were able, thanks to the skills of Ayres Purdie, to deal directly with the Inland Revenue at Somerset House and even lobby the Chancellor himself.

However, the League was hampered by how long it took for action to taken against resisters. It could be months before goods were distrained and an auction held, and it took years for Ayres Purdie's test cases to reach the courts. It was difficult to commit to actions which would take such time to have effect when, as Laurence Housman wrote in the introduction to the League's history, that there was always a sense that the vote was only just out of reach and that the next Franchise Bill would pass (Parkes, c. 1920, p. i).

In the end, the League's actions, based on a sound basis with significant historical precedent, were another weapon in the fight for the vote which was fought by many different groups and individual women on many different fronts.

In my presentations on this subject I have always concluded with Laurence Housman's words from his forward to the League's history:

> I have always regarded it as peculiarly far-seeing and wise in the line it had made its own. For tax resistance was a principle that both constitutional and militant were bound to approve, and one that British democracy, with its sound traditions and queer mental limitations was able to understand. (Parkes, c. 1920, p. iii).

However, in this chapter, I would like to give Margaret Kineton Parkes the final word.

> By all true suffragists the attainment of the vote must be regarded rather as the beginning than the end of women's political activity. (Parkes, c.1920, p. 41)

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3 Gender Board Composition and Tax Aggressiveness in Spanish listed companies for the period 2011-2017

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Abstract

In this study, we consider whether the gender composition of the board of directors could have some relation with tax aggressiveness for a sample of Spanish public listed companies covering the 2011-2017 period. Our fixed-effect models of panel data do not show any significant relation between female representation on the board of directors and tax aggressiveness.

Introduction

The frame of this study is the political agenda at the European level on gender equality in economic decision-making. In this area, we focus on whether the gender composition of the board of directors of a sample of Spanish public listed companies has some effect on tax aggressiveness for the period of 2011-2017.

We will first analyse the gender diversity of the board of directors in some European countries and the evolution of tax aggressiveness in the last decade. Then we will review the literature that investigates whether a higher level of women on the board of directors produces a lower level of tax aggressiveness. After that, we will start with the analysis of the Spanish case, with a panel of data and we will run an econometric model to see if gender changes in the board of directors affect the level of fiscal aggressiveness.

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Background

At the global level, the development of economies and policies to reduce inequalities has spread the importance of gender policy. Although, with differences between countries due to their cultural and social context, in recent decades there has been a progressive change in the role of women in society: to one exclusively of mother and wife, has been added the role of worker. While for some jobs the share of the female workforce is equal to or even greater than that of men, in others the access of women is *de facto* limited. An example of the latter is women directors on a board of directors in a multinational company. The importance of including women in this position not only responds to an obligation of equality and human rights, but also to the need to ensure a factor of diversity in the composition of the board of directors. Moreover, ensuring the equal opportunity for women will increase the human resources available in a country which could have a good impact on business performance (Bruno et al., 2018; Tillenius & Lango, 2018).

These are the reasons why, in 2012, the European Commission proposed a directive to increase the number of women on the boards of listed companies to 40% (European Commission, 2012b). The aim was to produce a drastic change in the low number of women on the boards of European companies. However, despite the broad consensus that the proposal has received, some European countries believed that this would be better achieved through national legislation in which each country could decide what type of legislation to adopt and so the directive was blocked.

In the end, some countries implemented soft legislation, while others implemented hard legislation. Soft legislation refers to cases where the law does not prescribe any binding quotas. The opposite, hard legislation, brings a variety of administrative penalties in cases where the mandatory quota is not achieved. The first case of hard legislation was back in 2003 in Norway, where the law states that public listed companies should have a 40% gender quota of the directors of the board. From that case, as reported in the table below, several European countries have produced different legislative solutions to increase the gender quota on the board of directors. However, the countries applying hard legislation have reached their targets by the given period, while countries applying soft rules have not reached their targets.

Thanks to the positive result that binding legislation has obtained, the European Commission has stressed the importance of adopting one (European Commission, 2016, 2019).

Table 3.1: Different quota regulation

Country	Bill passed	Target %	Deadline	Sanctions (Yes/No)	Gender quota 2017
Norway	2003	40%	2008	Yes	46%
France	2011	40%	2017	Yes	43%
Italy	2011	33%	2017	Yes	32%
Belgium	2011	33%	2019	Yes	32%
Germany	2015	30%	2016	Yes	32%
Netherlands	2014	30%	2023	No	22%
Spain	2007	40%	2015	No	20%

Source: Seierstad et al., 2017; Spencer Stuart, 2019.

In the case of Spain, this issue was first addressed in Law No. 3 of 2007 on Gender Equality, which recommended that companies with 250 or more employees should achieve at least 40% of women's representation on their boards of directors by 2015. However, as it was not mandatory, the target was not achieved by most of the companies. Later, in 2014, with Law 31, the Government established that each company would voluntarily establish a gender quota to be achieved. Finally, in 2015, the Code of Best Practices for Listed Companies foresaw that companies should have a 30% gender share of the board of directors by 2020. However, as those were not binding legislation, most companies have not achieved these targets.

With regard to tax aggressiveness, the concept is best understood by defining tax planning and tax avoidance. Tax planning refers to the use of legislation to reduce the tax burden, while tax avoidance refers to mechanisms to reduce the tax burden by using legislation in a different way from its purpose. Therefore, in the first case, governments offer the possibility of taking advantage of reduced tax liability to maximise equality and neutrality in taxation, while in the second case, taxpayers take advantage of loopholes in legislation to reduce their tax burden (European Commission, 2012a; IHS, 2017). Even if in recent years many countries have introduced legislation that defines the cases of tax avoidance, it is true that in most situations this requires a case-by-case analysis. In other words, the boundaries between what is and is not prescribed by the law are buried, leaving multinational companies to adopt tax structures that could be investigated by both the authorities and the European Commission, as well as questioned by NGOs and society. These practices are what we refer to as tax aggressiveness.

The problem of tax aggressiveness is not a recent one; already in 1998, the OECD published a report on the side effects of tax competition based on harmful preferential tax regimes (OECD, 1998). However, although in the last decade some countries have taken unilateral measures to counter tax avoidance practices, it is only with the 2008 financial crisis that the problem was addressed at the international level. Thus, in 2012, the G20, pushed by the society that was hit by the crisis and shaken by the scandals of aggressive tax planning, gave a mandate to the OECD to formulate guidelines on taxation. Therefore, the OECD decided to launch a project called BEPS (Base Erosion and Profit Shifting), which consists of 15 actions containing rules and general principles for the controversial areas of international taxation. The first set of rules was published in 2015. The BEPS project established a turning point in international taxation because its work includes more than 130 countries and jurisdictions and opens the discussion to the private sector. It also has required countries to move from unilateral legislation, which in some cases was not effective in dealing with international tax problems, to cooperative regulation that resulted in the signing of the Multilateral Legal Instrument (MLI) in 2018. With the MLI, more than 90 jurisdictions agreed on a minimum package of tax measures that would amend their national legislation and their double taxation conventions to reduce loopholes and minimise double taxation and double non-taxation problems.

The European Union has been an important player in this context by adopting in 2016 and 2017, two directives specifically dealing with tax avoidance practices: ATAD I and ATAD II. ATAD I contains a General Anti-Abuse Rule (GAAR) that states that every member country should adopt legislation that handles situations of tax avoidance. The requirement comes after a period of relative uncertainty where the European Court of Justice (ECJ) had included in some of the cases how the member cases should have fought tax avoidance and tax aggressiveness under the abuse of law principle (De Charette, 2019). Moreover, considering the fundamental principles of freedom and the competitiveness playing field in the European Union, the lack of legislation to control tax avoidance or not enforcing it could be equivalent to an implicit, *de facto*, state aid. For this reason, the European Union adopted specific legislation addressing this. ATAD I (Anti-tax avoidance Council Directive I 2016/1164, 2016) set a minimum level for all member countries on anti-tax avoidance rules, exit taxation and thin capitalisation. On the other hand, ATAD II introduces measures to prevent hybrid mismatch arrangements (Anti-tax avoidance Council Directive II 2017/952, 2017). Spain, as an EU member state, already included in its legislation all the anti-tax avoidance provisions with the 27/2014, reformed in 2018, Real Degree no.27 del Impuesto sobre Sociedades.

Literature review

In the following part we analyse the association between gender composition of the board of directors and tax aggressiveness. The role of the directors is strictly related to all the decision processes, including the amount of tax paid. Some studies have found a negative association between gender (women) and tax aggressiveness (Francis et al., 2014; Lanis et al., 2015; Sour, 2015). In the study conducted by Francis et al. (2014), they take a sample of Standard & Poor's (S&P) 1500 public companies for the time period from 1998 to 2007 and focus on the relation between the gender of CFO and tax aggressiveness of the firms. To measure tax aggressiveness, they use three different variables: the probability of tax sheltering, the predicted unrecognised tax benefit and the discretionary permanent book-tax differences. In all three cases, they find significantly lower levels of tax-aggressiveness for firms with a female CFO.

Lanis et al. (2015) arrive to a similar conclusion, where with a sample of 416 S&P 500 companies for a period 2006-2008, they find a negative relation of female representation on the board of directors and tax aggressiveness. In this case, the variables used for tax aggressiveness are the effective tax rate and the book-tax gap.

Hoseini and Gerayli (2018) also obtain the same result. In this case, they use 97 companies from the Tehran Stock Exchange from 2011 to 2015. The dependent variables chosen are the book-tax gap and the effective tax rate. They find a negative relation between the presence of women on corporate boards and the level of corporate tax avoidance, especially in larger companies. Moreover, repeating the model for each year separately, they find the coefficient of the independent variable of the presence of the women being negative for every year.

Another study is the one carried out by Richardson et al. (2016). With panel data of public listed Australian companies from 2006-2010, they find that the presence of female directors was negatively related to tax aggressiveness after controlling with variables like the age of directors and financial and tax expertise. So, to promote gender equality and considering there are no studies on board gender composition and tax aggressiveness for Spanish public listed companies, we believe this investigation is of interest. In this way, the Government could have better information to set binding gender quota on boards of directors.

Methodology

Data

The data is taken from two databases. For the information regarding gender, we use EIKON by Thomson and Reuters, while for the financial information we use ORBIS published by the Bureau Van Dijk. Due to the difficulty in the collection of all the data from 2011 to 2017, the research was limited to a sample of 26 public listed companies of the Spanish stock market, of which 16 are of the IBEX35. We do not select a specific sector, although we exclude financial and assurance companies due to their particular business and fiscal provisions.

Variables: dependent variable

For the dependent variables, we have selected three proxy variables that could represent the tax aggressiveness of companies. The first one is the ratio of taxes paid on turnover (TTS). With this ratio, we want to determine whether the gender of the directors could influence the strategy of the companies and, therefore, the payment of taxes.

Another variable used as a proxy of tax aggression is the percentage of effective tax rates (ETRS) (Francis et al., 2014; Hanlon & Heitzman, 2010; Hoseini & Gerayli, 2018; Lanis et al., 2015). The ETR will take the tax paid on the earnings before tax (EBT), without considering the tax adjustments. The rate is calculated by dividing the taxes paid by the accounting result. For this, we have considered only the cases where a positive EBT is found.

The third proxy variable that we have used is the book-tax difference or gap (BTD). In this case, the ratio is calculated by dividing the difference between the EBT and taxable income by the total assets. Taxable income is calculated by dividing taxes by the statutory tax rate, which in Spain is 25%. Finally, during the period of time, there have been two changes in the rate of corporate income tax, a decrease from 30% to 28% in 2013 and from 28% to 25% in the following year, we use 25% as the rate for each year. So, we recalculate the amount of tax for the whole period on the basis of a tax rate of 25%.

Independent variables

Our independent variable is gender diversity on the board of directors (WBOP), calculated as the percentage of women on the board of directors. We took this percentage at the end of each of the seven fiscal years.

Control variables

As control variables, we selected different type of financial ratios: profitability, operational and structure ratios.

Table 3.2: Variables

ETRS	Effective Tax Rate 25% = Payable (+) or Refundable (-) Taxes /Taxes Earnings Before Taxes
BTD	Book-Tax Difference or gap = (EBT-Taxable Income) / Assets = (EBT- Taxes/ Statutory Corporate Income Tax Rate (25%)) / Assets
TTS	Taxes on turnover 25% = Payable (+) or Refundable (-) Taxes / Turnover
WBOP	Board Gender Diversity, Percent = no woman board / total no board
EBITDAM	EBITDA margin (%) = (EBITDA / Operating revenue) * 100
ROA	ROA using Earnings Before Tax (EBT) (%) = (EBT / Total Assets) * 100
ROE	ROE using Earnings Before Tax (EBT) (%) = (EBT / Shareholder funds) * 100
RLE	Total Liability/Equity
RS	Solvency ratio (Asset based) (%)
FT	Financial expenses / sales * 100
EVE	Enterprise Value/EBITDA

Among the profitability ratio we used the EBITDA margin as a percentage of the EBITDA on the operating revenue, the Return on Assets (ROA) based on the earnings before tax, Return on Equity (ROE) and finally the enterprise value divided by the EBITDA. Taking into consideration the operational ratios, we select the interest paid on turnover. This was also included in considering the effect of the financial expenses on profit and the amount of tax paid. Finally, among the structure ratios, we chose the solvency ratio based on asset and the liabilities on equity.

Model

We have worked with the panel data of 26 public listed Spanish companies for the period 2011-2017. The panel data, unlike cross-sectional data, allows us to consider more than one year and, unlike time series, allows us to include more than one individual in the study. So, a panel data set has multiple entities, each of which has repeated measurements of the same variables during a selected time period. Panel data may have an individual (group) effect and time effect which are analysed, jointly or individually, by fixed effect and random effect models. As the characteristic of our panel, we have a long-balanced panel, and we focus on linear regression. Unlike pooled ordinary least square (OLS), panel data allows us to correct the heterogeneity of the model that although cannot be measured, remains constant during the period.

For the model, we consider only individual effect (one-way) and we leave apart the time effect (two-way). With this equation, we run the fixed effect and random effect models. And we choose two between these two models, applying the Hausman test.

$$Y_{it} = \beta X_{it} + \eta_i + u_{it}$$

The Y is the independent variable, the X is our independent and control variables, η is the unknown parameter and the u is the error term.

Results

Descriptive analysis

The table below reports the mean of the descriptive analysis included in the annex for each year for the three dependent variables (*ETRS, BTD, TTS*), for the independent variable (*WBOP*) and for the control variables (*WEMP, EBITDAM, ROA, ROE, RLE, RS, FT, EVE*). The dependent variables *ETRS, BTD* and *TTS,* have a mean of 18.44, 0.13 and 3.44 respectively. The independent variable WBOP has a mean equal to 17.12.

This means that women representation on the board is small. Added to this, we saw a small increase during the period, from 15.05% in 2011 to 21.77% in 2017.

Table 3.3: Descriptive analysis

Variable	Obs	Mean	Std. Dev.	Min	Max
ETRS	154	19.53	20.42	-99.69	69.30
BTD	182	0.13	6.06	-54.24	33.12
TTS	182	3.44	5.78	-10.68	50.85
WBOP	182	17.11	8.94	0.00	45.45
WEMP	182	12.38	7.87	0.00	33.33
EBITDAM	182	23.49	20.47	-15.37	79.51
ROA	182	6.57	11.43	-39.25	85.00
ROE	182	15.86	46.00	-259.55	180.03
RLE	182	562.69	1467.28	-732.78	9816.70
RS	182	33.82	24.38	-68.39	87.50
EVE	182	10.81	7.22	-30.76	41.15

Correlation analysis

With the Pearson correlation analysis (see the annex), we want to check the association of the variables we use. In this case, the association does not mean a causality effect but a linear relationship moving from -1 to +1 where negative signs showed an inverse relation while a positive direct relation. In this first analysis, there is no association between the independent and the dependent variables. However, repeating the analysis for each company, we can see that in some cases, the relation between the dependent variables and the independent variable is strong, but with an opposite sign, so when they are combined, the individual effects neutralise each other. Added to this analysis, most of the financial variables in the control group have an association between them and the dependent variables.

Regression analysis

We run three models, one for each of the three dependent variables: effective tax rates (ETRS), book-tax difference (BTD) and taxes on turnover (TTS). We did not use OLS because we would have lost the individual differences that we have in panel data. To decide whether to use the fixed or random effect model, we apply the Hausman test. Finally, we run the fixed effect one-way model for each of three variables. We also check each model for serial correlation, heteroskedasticity and autocorrelation of the residual and each model shows problems of autocorrelation.

Table 3.4: Regression analysis

Panel data fixed effect			
Variables	ETRS	BTD	TTS
WBOP	-0.375	-0.036	0.028
	(0.28)	(0.05)	(0.05)
EBITDAM	0.453	-0.084	0.365
	(0.46)	(0.09)	(0.06)***
ROA	0.768	0.459	
	(0.26)***	(0.04)***	
ROE	0.054	-0.012	-0.013
	-0.090	(0.01)	(0.01)*
RLE	0.003	-0.001	
	(0.00)	(0)	
RS		0.030	-0.073
		(0.04)	(0.04)*
FT		-0.425	0.596
		(0.09)***	(0.07)***
EVE	0.219	0.147	0.219
	-0.500	(0.04)***	(0.05)***
Number of groups	25	26	26
Number of obs	154	182	182
F (Model)	2.60**	328.48***	25.11***
Adj R-squared	35.23%	77.15%	69.74%

Significance at the 10%, 5%, and 1% levels is indicated by *, **, and ***, respectively.

The result of each model is that the gender composition of the director board (WBOP) does not affect the tax aggressiveness. In the first model, taking the Effective Tax Rates (ETRs) as a dependent variable, a positive coefficient will mean a lower level of tax aggressiveness. Holding all other variables constant, for one unit increase in ROA, the ETRS is expected to increase by 0.77 units, meaning a lower level of tax aggressiveness with a p-value less than .01 small enough to reject the $H_{0.}$ of non-linear relation between Return on Assets (ROA) and tax aggressiveness. In this model, only the Return on Assets (ROA) results to be a significant variable.

With the second model, we considered the difference between the Earnings Before Tax (EBT) and the Taxable Income (TI) divided by the total assets, as an estimation of tax aggressiveness. Therefore, an increment in the ratio (BTD) will mean an increase in the level of tax aggressiveness. In this model, the ROA presents a *p*-value less than .01. So, in line with the result we obtained in the first model, an increment of one unit of ROA will produce an increase in the BTD of 0.46. In this second model, we have another variable showing a *p*-value sufficiently low to reject the H_0 ratio resulting from dividing the financial expenses by the sales (FT). This ratio measures the percentage of sales that are needed to cover the financial expenses. Although the ratio is derived by a variety of factors, a lower level of it is usually associated with a healthier company because the cost of external capital would be lower compared to the sales. As the coefficient of the variable is negative, a higher cost of external capital will be related to a lower level of tax aggressiveness. Finally, also, the market value is related to a higher level of tax aggressiveness. So, for a given EBITDA, an increment in the enterprise value would represent an increment of tax aggressiveness.

In the last model, we have considered as a dependent variable, the taxes paid over the turnover (TT). Also, in this case, for the independent variable, we do not have enough evidence to reject the H_0. However, all the other variables have a *p*-value of the t-test sufficiently low to reject the H_0. In this case, the high level of the dependent variable means a low level of tax aggressiveness. Although the other variables have a *p*-value of the *t*-test sufficiently low to reject the H_0, the signs are not always justified by economic reason. The ROE in this model results to be significant with a minus sign. Considering that it is calculated taking the Earnings Before Tax (EBT), it should be positive, meaning that a higher income for the shareholder should be related also to a higher taxable income.

Discussion and conclusion

The subject of this research was whether the gender diversity of the board of directors affected the tax aggressiveness of companies. We have seen that Spain, unlike other European countries, has not yet passed a law with a mandatory target. As a result, Spanish companies have adopted heterogeneous policies on this issue, and the result is that, on average, only 21.77% of the members of the board of directors are women. These differences are also reflected in the econometric models that we have run where the gender share of the board of directors was not found to be a significant variable to explain the variance of fiscal aggressiveness in each model. On other hand, this variance was partly explained by the control variables we selected. For this reason, it is believed that the Spanish Government should set a mandatory target on gender policy to increase the number of women on the board of directors.

In addition, future studies on tax aggressiveness could add other variables of the members of the board of directors such as culture, skills, age or other characteristics so that the Government can promote a culture of best practices in tax matters.

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Annexes

Descriptive analysis

Variable	Year	Mean	Std. Dev.	Min	Max
ETRS	2011	19.10	12.19	-15.66	41.74
BTD	2011	0.77	3.41	-9.37	10.08
TTS	2011	2.86	5.03	-10.68	16.70
WBOP	2011	15.05	6.84	5.88	30.00
EBITDAM	2011	23.96	20.05	5.10	76.32
ROA	2011	7.01	11.01	-12.82	49.40
ROE	2011	24.84	45.59	-85.63	180.03
RLE	2011	642.54	1444.86	38.70	7037.04
RS	2011	32.92	19.12	1.40	72.10
FT	2011	4.26	3.78	0.05	14.56
EVE	2011	8.58	3.80	1.63	20.20
ETRS	2012	20.31	9.91	-1.16	37.15
BTD	2012	0.45	3.37	-7.31	7.02
TTS	2012	1.98	4.99	-8.45	15.85
WBOP	2012	15.51	8.37	5.88	40.00
EBITDAM	2012	22.76	20.76	4.29	77.96
ROA	2012	4.88	11.86	-13.86	46.55
ROE	2012	14.15	49.06	-92.51	173.15
RLE	2012	675.37	1709.56	24.37	8761.27
RS	2012	33.98	20.52	1.13	80.41
FT	2012	3.99	3.41	0.07	12.70
EVE	2012	10.79	7.25	1.38	31.15
ETRS	2013	13.41	33.05	-99.69	59.26
BTD	2013	-0.15	4.90	-16.87	6.63
TTS	2013	2.78	4.29	-3.57	16.49
WBOP	2013	15.27	9.39	0.00	36.36
EBITDAM	2013	23.22	20.49	5.08	77.68
ROA	2013	5.02	9.35	-14.70	31.62
ROE	2013	16.80	39.53	-63.97	155.97
RLE	2013	706.49	1901.81	21.18	9816.70
RS	2013	35.16	21.82	1.01	82.52
FT	2013	3.71	3.46	0.07	11.74
EVE	2013	12.60	10.24	-3.04	41.15
ETRS	2014	21.58	21.33	-57.20	69.30
BTD	2014	-0.19	3.37	-11.59	5.18
TTS	2014	3.38	3.72	-0.67	17.30
WBOP	2014	16.56	9.35	5.26	45.45
EBITDAM	2014	23.64	20.69	2.21	76.57

Variable	Year	Mean	Std. Dev.	Min	Max
ROA	2014	6.35	7.45	-2.79	30.92
ROE	2014	6.35	19.87	-10.17	75.01
RLE	2014	532.66	1553.58	-681.38	8003.61
RS	2014	34.83	24.55	-17.20	85.55
FT	2014	4.00	4.38	0.06	16.26
EVE	2014	12.18	7.35	-2.54	30.30
ETRS	2015	16.92	23.22	-53.33	58.73
BTD	2015	0.58	5.04	-15.57	14.91
TTS	2015	3.07	4.56	-1.97	17.74
WBOP	2015	16.55	8.82	5.26	41.67
EBITDAM	2015	22.72	22.11	-14.99	79.51
ROA	2015	5.76	9.95	-23.04	29.78
ROE	2015	0.90	74.59	-259.55	69.64
RLE	2015	613.38	1512.35	-698.95	7120.88
RS	2015	34.84	25.41	-16.70	87.50
FT	2015	4.00	4.58	0.06	15.89
EVE	2015	11.21	5.41	-4.88	21.82
ETRS	2016	26.07	8.20	8.29	47.37
BTD	2016	-2.69	10.97	-54.24	3.68
TTS	2016	4.87	5.31	0.51	23.67
WBOP	2016	19.10	9.14	7.69	36.36
EBITDAM	2016	23.80	21.33	-15.37	76.07
ROA	2016	6.09	11.66	-39.25	29.29
ROE	2016	23.18	18.06	-14.80	62.01
RLE	2016	387.61	1055.26	-732.78	5343.10
RS	2016	32.17	31.64	-68.39	86.01
FT	2016	6.29	15.40	0.02	79.66
EVE	2016	9.02	8.87	-30.76	18.06
ETRS	2017	18.47	23.42	-85.99	45.91
BTD	2017	2.13	6.96	-8.49	33.12
TTS	2017	5.17	10.10	-4.57	50.85
WBOP	2017	21.77	9.31	5.88	41.67
EBITDAM	2017	24.36	20.20	5.52	77.11
ROA	2017	10.87	16.73	-0.19	85.00
ROE	2017	12.19	50.87	-224.46	57.16
RLE	2017	380.77	1016.96	-495.77	5169.94
RS	2017	32.83	27.96	-37.87	75.74
FT	2017	4.27	8.50	0.04	42.73
EVE	2017	11.27	5.42	5.17	27.52

Pearson correlation analysis

	ETRS	BTD	TTS	WBOP	EBITDAM	ROA	ROE	RLE	RS	FT	EVE
ETRS	1										
BTD	-0.4439 ***	1									
TTS	0.221 ***	0.0482	1								
WBOP	-0.191 **	0.1351 *	0.0373	1							
EBITDAM	0.025	0.1551 **	0.5306 ***	0.2385 ***	1						
ROA	0.085	0.6181 ***	0.4549 *	0.0783	0.2080 ***	1					
ROE	0.0146 *	0.0186	0.0487	0.0874	0.2598 ***	0.2119 ***	1				
RLE	0.045	-0.0248	0.3532 ***	-0.0479	0.3847 ***	-0.166 **	0.1465 **	1			
RS	0.057	0.3322 ***	-0.2709 ***	0.0326	-0.0317	0.3589 ***	0.1081	-0.3488 ***	1		
FT	-0.1402 *	-0.4411 ***	0.4421 ***	0.0093	0.0124	-0.2071 ***	-0.2732 ***	-0.0558	-0.5812 ***	1	
EVE	0.0665	0.4058 ***	-0.0905	-0.0776	-0.0861	0.3282 ***	-0.1191	-0.2196 ***	0.3955 ***	-0.2903 ***	1

Significance at the 10%, 5%, and 1% levels is indicated by *, **, and ***, respectively.

4 A Gender Perspective on the Role of Tax Law in Support of the Sustainable Development Goals and the New European Consensus on Development

Cristina Trenta[1]

Abstract

The chapter investigates the role of taxation in the light of the evolution from the UN Millennium Development Goals (MDGs) to the UN Sustainable Development Goals (SDGs) in the current European tax law and development landscape and in connection with the New European Consensus on Development, paying specific attention to the gender and human rights implications of tax systems in the achievement of the SDGs. The chapter concludes that a substantive coherent approach that transforms declarations and intents into factual, concrete, unambiguous legislation in the field of taxation, reversing its accepted impact on gender equality and promoting overall sustainable development, is still not there. In the absence of concrete measures in support of gender equality, and without wide-spread political will to create gender responsive fiscal systems, sustainable development models will not succeed.

Introduction

In 1987, the Brundtland Commission, originally established by the UN in 1983 as the World Commission on Environment and Development (1987), defined sustainable development as the human ability "... to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs".

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In 2006, recalling that very same definition, the Council of the European Union (2006) emphasised that sustainable development is an overarching objective of the European Union (EU), as set out in the Treaty governing all of the Union's policies and activities. Any activity directly supporting sustainable development efforts within the EU or part of the Union's international outreach should respect the principles of democracy, gender equality, solidarity and the rule of law. It should also respect the fundamental rights as set out in the Charter of Fundamental Rights (EU, 2012), including freedom and equal opportunities for all. Furthermore, sustainable development finds explicit acknowledgment in EU Treaties along three different dimensions of development which have to be addressed together, systemically: economic, social and environmental. A life of dignity for all, a peaceful society and social inclusion are, in the view of the EU, at the core of sustainable development (European Commission, 2016).

This chapter investigates the legal dimension of sustainable development as it specifically relates to gender, gender equality and human rights issues in the context of tax law as one of the elements of a state's policing (Enders & Remig, 2014). While this area of research sits squarely within the European, international and national development debates, specific attention to the connection between tax law, sustainable development and human rights, while gaining considerable relevance and coverage in the mainstream press (OECD, 2018), remains for now a topic little explored in academic inquiry (Gunnarsson & Eriksson, 2017).

Theory and goals

According to the UN's (1986, Preamble) own '*Resolution on the Right of Development*', development is an interdisciplinary area of study and intervention as development represents "a comprehensive economic, social, cultural and political process".

Because of this, the chapter adopts an interdisciplinary legal methodology process, with legal concepts, principles and findings being anchored, complemented and supported by conceptualisations and observations from ancillary non-legal disciplines. Specifically, the study will adopt Lamb's (2005) interdisciplinary method for taxation to identify, analyse and elaborate social data from a tax law perspective. The approach is particularly useful when research questions in the legal domain are strictly intertwined with a necessary understanding of societal issues and factors (McKerchar, 2008). The approach allows researchers to evaluate the existing legal framework in detail without renouncing the possibility of a *lex ferenda* perspective, what the law should be or how it should regulate a particular situation.

Additionally, the chapter adopts a substantive approach to the issue of gender equality, human rights and tax law (Gunnarson, 2011). In this sense, it can also be framed as research about law rather than research in law.

Sustainable development and human rights

The UN's (2000) Millennium Development Goals (MDGs) were a set of international goals introduced in 2000 after the UN's Millennium Summit. UN members agreed on fighting poverty and hunger, improving health and education and promoting gender equality. The MDGs process ended in 2015: it has been replaced by the Sustainable Development Goals (SDGs) framework, part of the 2030 Agenda adopted by the UN in September 2015 (UN, 2015). The shift from the MDGs to the SDGs acknowledges the novel importance attributed to human rights and sustainability for global development. The 2030 Agenda also identifies in the worldwide implementation of human rights the way to avoid discrimination based on "race, colour, sex, language, religion, political or other opinions, national and social origin, property, birth, disability or other status". The preamble of the document explicitly singles out the important role the realisation of human rights, gender equality and the empowerment of all women and girls, play in the process of sustainable development (UN, 2015, Preamble).

As such, the new 2030 Agenda is much more ambitious and broader in scope, and now comprises 17 SDGs and 169 targets. The goals are universal goals applicable to all countries, not only to developing ones, aimed at creating an inclusive society for all. The Agenda pays specific attention to the democratic process and to the rule of law, and is one of the most inclusive and ambitious international agreements currently in force. The goals and targets are integrated and indivisible, and considering their systemic integration and interplay, are necessary to achieve the Agenda's overarching objectives (UN, 2015, para. 84, p.34).

The EU declared 2015 the year for development (European Council, 2014) and embraced the UN 2030 Agenda. In June 2017, the European Parliament, the European Council and the Commission adopted the "New European Consensus on Development" (EU, 2017). This document recognises that "the evolution from the Millennium Development Goals (MDGs) to the Sustainable Development Goals (SDGs) reflects the changing approach to global development."

Such an approach, based on sustainable development and human rights, is "fully consistent with EU values and principles" (European Council, 2017). The adoption of a new paradigm for sustainable development for the effective implementation of human rights is consistent with EU values: human rights and people's well-being are a core value proclaimed in art. 2 of the Treaty of the European Union (TEU, 2012), as did the Lisbon Treaty (2007).

The TEU contains a specific commitment to working for the sustainable development of Europe and ties it to economic and social progress via the establishment of the internal market:

> "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." (TEU, art. 3(3)).

The EU Charter of Fundamental Rights upholds this promotion of balanced growth and sustainable development (EU, 2012, Preamble), and adds in the principles of equality and non-discrimination (EU, 2012, art. 21).[2] The Charter also contains an express commitment to combat poverty, and to ensure a dignified life for all those who lack sufficient resources (EU, 2012, art. 34). Overall, these documents bind the EU and its Member states to promote the universal values of democracy, good governance, rule of law and the upholding of human rights for all as a necessary precondition to their ongoing sustainable development (EU, 2017, para. 61, p. 32).

2 The CJEU has defined discrimination as involving "the application of different rules to comparable situations or the application of the same rule to different situations". See *Case C-342/93, Joan Gillespie and others v Northern Health and Social Services Board*s, ECLI:EU:C:1996:46. para. 16.

The Court of Justice of the European Union (CJEU) supports this approach: in the *European Parliament v Commission* case, the Court stated that "(t)here can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights" (Cremona, 2008; Case C-403/05, 2007).

Gender equality

The upholding of human rights obviously presents a gender equality facet. It is important in this context to differentiate between passive non-discrimination and active promotion of equal rights (Brzezińska, 2009). While the EU Charter states that men and women are equal (EU, 2012, art. 23), art. 8 of the Treaty on the Functioning of the European Union (TFEU, 2012) prescribes instead that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".

The EU and the EU Member states have an obligation to work towards gender equality in their legislative, political and administrative activities clearly spelled out in the EU framework (EU Commission, 2015). Art. 10 of the TEU prescribes an obligation for the Union to define and implement policies and activities to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; art. 2 and art. 3(3)(2) of the TFEU support and protect gender equality. Specific recognition is also found in the case law of the CJEU and of the European Court of Human Rights (EctHR).

The EctHR (2012, para. 127) maintains that "the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention", while the CJEU has repeatedly held that "(t)he right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure" (Case C-50/96). Additionally, all EU Member states have ratified the 1979 UN "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW, 1979); consequently, they must respect the duties deriving from the Convention (Burri & Anne, 2013, para. 4.4, p. 11).

The new European Consensus on Development also states that the EU and its Member States will proceed in accordance with the fulfilment of obligations under the CEDAW, and firmly embrace the protection and fulfilment of women's and girls' rights (EU, 2017, p. 13). The Agenda 2030 commits to (UN, 2015, para. 3) "combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls".

Inequality is closely related to discrimination. The Agenda 2030, while on one hand seeks to reduce inequality (Goal 10), on the other hand wants (target 10.2) to "(e)mpower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status".

Goal 5's specific aim is gender equality and the empowerment of women and girls: its target 5.c addresses the need to accordingly adopt sound policies and legislation that support both goal and target. In turn, this requires not only the achievement of formal equality (UN Women, 2015), but that of substantial equality, the actual equal enjoyment of one's human rights.

The concept of substantive equality in gender equality issues has been positively included in the CEDAW (1979).[3] Its art. 3 includes obligations for states to take "(a)ll appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men", while the Committee's General Comment 25 maintains that substantive legislative equality is primarily linked to the results and outcomes of laws and policies and this requires a long-term perspective for the evaluation of those changes in the power structures that currently affect women and men differently (CEDAW, 2004).

3 CEDAW, art. 1 provides: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

Sustainable development, tax law and gender equality

The current SDGs framework positively includes taxation and other forms of revenue collection as a means to achieve sustainable development. In particular, Goal 17, target 1 of the SDGs maintains that states should "strengthen domestic resource mobilisation, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection".

The UN emphasised the role of mobilising domestic resources as a crucial step in the financing of the post-2015 sustainable development agenda, as well as in complying with existing commitments to make tax systems more pro-poor (UN, 2014, para. 3). This is an important signal, and the specific attention paid to the role of taxation in the SDGs has been echoed at the EU level. The New European Consensus on Development document directly addresses taxation as a tool to achieve sustainable development:

> "The EU and its Member States will promote effective and efficient resource mobilisation and use, including through initiatives such as the 'Collect More, Spend Better' approach. They will address tax evasion, tax avoidance and illicit financial flows as well as the efficiency, effectiveness and fairness of tax systems and of social protection financing." (UN, 2017, p. 49).

EU Member states needs to counteract money laundering, corruption, illicit financial flows and tax evasion and avoidance since they are factors that clearly hinder sustainable development (UN, 2017, pp. 28 and 53), and international obligations mandate contracting states to collect financial resources in such a way as to make the upholding of human rights more effective.

This is what the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) prescribes in its art. 2(1):[4] the duty for contracting states to allocate the maximum of available resources, and therefore to collect revenue from taxation, in order to secure and make the upholding of human rights more effective. The CEDAW itself con-

4 ICESCR, art. 2(1) provides: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

tains similar provisions, in art. 2 (CEDAW, 2004)[5] and art. 3 (CEDAW, 2004),[6] which stipulate that states have to mobilise resources to support women's rights (European Parliament, 2016a). More recently, the link between tax and fiscal policy, revenue-raising, expenditures and human rights brought forward by art. 2(1) of the ICESCR has been acknowledged by the United Nations.

UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, submitted her report on the impact on human rights of fiscal and tax policy at the 26th Session of the United Nations Human Rights Council in June 2014. The document argues that states should "(a)lign fiscal policy with human rights obligations […] including by raising sufficient public revenue in equitable ways, allocating and spending revenue to realise human rights for all" (UN, 2014, p. 22).

That same document also establishes, (UN, 2014, para. 31), that state parties have "an obligation to create an international enabling environment for the fulfilment of economic, social and cultural rights, including in matters relating to taxation". The document's Recommendations, para. V (UN, 2014), also include:

> A commitment to align fiscal policy with human rights obligations as part of the post-2015 sustainable development framework, including by raising sufficient public revenue in equitable ways, allocating and spending revenue to realize human rights for all, and strengthening public oversight, transparency, participation in and accountability over fiscal policy, tackling tax evasion and illicit financial flows.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights maintain that while guaranteeing these rights is a matter of international law, national states are carrying responsibility for their effective upholding (International Commission of Jurists, 1997, para. 2). Violations of human rights generated by sub-standard public financing

5 CEDAW, art. 2 provides: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women".

6 CEDAW, art. 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".

shift on the individual state any responsibility of the consequent social, and fiscal, injustice (Saiz, 2013).

While human rights obligations do not dictate the details of taxation policies, with states maintaining ample discretionary power in the area, international treaties such as the ICESCR impose obligations that result in constraints to the formulation of said policies (UN, 2014). A state would breach its international human rights obligations not only by allowing large-scale tax evasion, but also by enabling or by failing to amend tax structures that asymmetrically weigh on the most vulnerable part of the population (De Schutter, 2017; UN, 2014).

The combined dispositions of the CEDAW and of international human rights treaties such as the ICESCR suggest that contracting states have a clear obligation to work towards the realisation of women's rights not only domestically, but also internationally. These duties include refraining from issuing laws and policies which not only directly, but also indirectly, hinder women's equal enjoyment of their rights (Berne Declaration, 2016).

Sustainable development, tax law and poverty

The connections between poverty and the violation of human rights has been made by various UN agencies over the years (International Bar Association (IBA), 2013, p. 98). Poverty is both a cause and an effect of the breach of human rights (IBA, 2013, p. 99), and women over the world are particularly affected by this damaging loop (Kabeer, 2015).

Under the Beijing Declaration and Platform for Action (Beijing Declaration, 1995), a set of recommendations for the UN adopted at "The Fourth World Conference on Women" held in Beijing in September 1995, states are required to promote women's economic independence by alleviating the disproportionate burden of poverty on women "through changes in economic structures" (UN, 1995, para. 26). In order to address gender inequality, states are required to analyse their policies and programs, including those related to taxation, from a gender perspective, and measure their impact on poverty, on inequality and the influence they specifically have on women (UN, 1995, para. 58).

The European Parliament has more recently issued a Resolution on a gender perspective on poverty, where a case is made that not only the number of women in poverty remains higher than that of men living in poverty but, given the intergenerational dimensions of poverty, addressing the situation of girls and young women who are facing social exclusion is a key factor in addressing the feminisation of poverty (Buvinic, 1993; European Parliament, 2016b).

The UN directly ties good tax policing not only to economic growth, but also to improved governance and accountability and to the achievement of equality (UN, 2018). The Special Rapporteur Cardona herself states that tax abuse is not a "victimless practice", but a harmful practice which limits resources that could be spent on the eradication of poverty and the realisation of human rights (UN, 2014). The UN Human Rights Office of the High Commissioner similarly affirmed that high levels of tax abuse undermine the principles of equality and non-discrimination (UN, 2014; Vanistendeal, 1996). Tax liability should be based on the taxpayer's ability to pay.

Since collecting tax revenue is not the end in itself, but rather a tool for economic growth, development and the fulfilment of human rights (Bohoslavsky, 2016, p. 10), the loss of tax revenue and all tax–related infringements are not only contrary to international human rights obligations, but are also in breach of target 17.1 of the SDGs. Since insufficient public resources hinder women's rights and may contribute to gender inequality (Grondona & Rodriguez-Enriquez, 2016; NYU, 2016), all tax–related infringements also present a very conspicuous equality and gender aspect (Seguino, 2016) which is very conspicuously absent from mainstream tax conversations.

Tax evasion and tax avoidance are among the main indirect factors in the perpetuation of gender inequality. The UN has clearly drawn a connection between the decrease of available resources in the national budget due to such practices, the manoeuvring of governments to increase revenue through alternative means and the increased vulnerability of the weaker parts of the population, including women (Bohoslavsky, 2016, para. 24).

There are also direct effects that are derived from the loss of public revenue connected to tax abuse: the reduction of available public resources that states can spend impacts the realisation of substantive equality and the accomplishment of the obligations descending from the ICESCR and the CEDAW, simply because these become second-tier goals after what are perceived as more pressing public needs such as education, healthcare and security. Unfortunately, this only exacerbates existing issues and runs counter to the principles of equality and non-discrimination (Berne Declaration, 2016).

Conclusions

The chapter investigates the gender and human rights dimensions of tax law in connection to the objectives set by the SDGs and to those of substantive equality. An examination of the primary European and international frameworks on gender equality, and of the European and international obligations dealing with human rights, presents a contradictory landscape. Treaties and agreements, at both the European and international level, insist on the importance of fiscal policies in the creation of a sustainable future, and how a sustainable future includes the end of discrimination. Contracting states not only have a general duty to eradicate discrimination: they also have a specific duty to eliminate substantive discrimination against women and to actively implement legislative measures that support gender equality (EU, 2012).

On the other hand, a substantive coherent approach that transforms declarations and intents into factual, concrete, unambiguous legislation in the field of taxation, reversing its accepted impact on gender equality and promoting overall sustainable development, is still not there.

The European Parliament Resolution on "Poverty: a gender perspective" (European Commission, 2018; European Parliament, 2016a) shows alarming figures when discussing gender equality. It is enough to mention, just as an example among many, that single-parent families are reported to be at greater risk of poverty or social exclusion, and women accounted for 56.6% of single-parent households in the Union in 2014. Unfortunately, the picture is painted of women themselves as a heterogeneous group where often inequality adds to inequality: elderly women, single mothers, transgender women, women with disabilities, migrant women, women from ethnic minorities. Substantive gender equality for all of these specific groups is a daunting but necessary effort, and one that has profound ramifications for and within tax policing and tax law. This is not a matter of discussion at the EU level (European Parliament, 2018): the European Parliament 2018 Report on gender equality and taxation policies in the EU acknowledges the gender bias embedded in current EU taxation systems, outlines the importance of tax justice for gender quality (European Parliament, 2018) and establishes once more gender equality as one of the cornerstone EU principles, whose effects directly relate to increased prosperity and stability, and one that is crucial for achieving the SDGs and the objectives of the 2030 Agenda (EU, 2017, p. 7).[7]

From a European perspective, human rights are under the protection of the EU Charter. Such rights can be violated by Member states if they are rendered factually ineffective or if legislative measures directly breach what is established in the Charter (Grigonis, 2017). Infringements of the Charter's provisions may also occur when Member states implement or fail to implement EU law (EU, 2012, art. 51).

From an international angle, the situation does not look different. The extraterritorial obligations contained in the CEDAW can be breached if a state's tax legislation impairs the capability of other states to mobilise available resources for the fulfilment of women's rights, and as well as for the eradication of gender-based discrimination (Center for Economic and Social Rights et al., 2016).

Since the EU and its Member states should legislate so that a gender perspective is systemically included in all policy areas as part of the fundamental efforts that need to be in place to successfully achieve the SDGs (UN, 2017, p. 15), tax law cannot call itself out. As of today, taxes are gendered: an effective, institutionally equal tax framework is a necessary part of any effort aiming at substantive gender equality, and this includes a methodical integration of a gender perspective throughout the entire process (OECD, 2014, 2015). Without a satisfactory fiscal policy in place, not only will Goals 5 and 10 not be met, but the 2030 Agenda objectives will not be met as well (Global Alliance for Tax Justice, 2018).

Tax policies until the present have focused more on the promotion of rough economic growth, through the granting of tax-free zones, the

7 The European Parliament has also called for the creation of a specific body whose mandate would be to develop specific gender taxation expertise and "to promote gender-equal taxation reforms in all international fora, including the OECD and the UN, and to support the creation of a UN intergovernmental tax body with universal membership, equal voting rights and equal participation of women and men; stresses that this body should be well equipped to develop specific gender taxation expertise".

tolerating of tax havens and the establishment of low-taxation countries. Substantial changes are necessary for substantive equality: as the Bogota Declaration on Tax Justice for Women's Rights has clearly evidenced, these policies have directly rewarded male-dominated corporations (Bogota Declaration, 2017). In the absence of concrete measures in support of gender equality, and without widespread political will to create gender responsive fiscal systems, sustainable development models will not succeed. This rising tide either lifts all the boats, or it will be like it lifted none.

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5 Co-operative Compliance in Tax Administration: The Case of Ireland

Lucy Bowe[1]

Abstract

Tax administrations worldwide face similar challenges in improving taxpayer services, addressing non-compliance and reducing costs. Initiatives aimed at achieving these goals are often adopted across many jurisdictions and supported by international organisations. This chapter discusses the Irish experience of Co-operative Compliance (CC), a tax administration initiative which is strongly supported by the Organisation for Economic Co-operation and Development (OECD) and has been implemented in over 30 tax jurisdictions to date. CC envisions taxpayers voluntarily working with tax administrations in a real-time transparent manner, with the aim of providing benefits for both tax administrations and taxpayers. Drawing on Irish Revenue and OECD publications, public discourse and relevant scholarly work, this chapter reveals that, 15 years since its introduction in Ireland, the practical implementation of CC raises broader questions worthy of further research including the motivations of tax administrations in the selection and adoption of new schemes; the performance measurement and management systems employed to assess such initiatives; and the impact of CC on trust levels of taxpayers, advisers and Revenue. A more in-depth review of Irish CC is required to enhance our understanding of programme specific challenges, motivations and outcomes and also provide a broader understanding of the multiple variables at play in the design, adoption, evaluation and amendment of any similar initiative in tax administrations.

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Introduction

Tax administrations worldwide face similar challenges in improving taxpayer services, addressing non-compliance, minimising the administrative burden on taxpayers and reducing costs. Initiatives aimed at achieving these goals are often adopted across many jurisdictions and supported by international organisations.[2] This chapter discusses the Irish experience of Co-operative Compliance (CC), a tax administration initiative which is strongly supported by the Organisation for Economic Co-operation and Development (OECD) and has been implemented in over 30 tax jurisdictions worldwide to date (Szudoczky & Majdanska, 2017). Co-operative Compliance (CC), supports the idea of taxpayers and tax administrations working together in partnership, to foster a collaborative approach to compliance (Bronzewska, 2016). This new approach aims to move away from the traditionally confrontational interactions between these parties. Instead, its objective is to foster a mutually beneficial relationship and build an environment of trust and transparency (OECD, 2008).

Ireland was one of the first tax jurisdictions to introduce CC and, more than 15 years since its introduction, this chapter provides a timely analysis of the Irish CC journey. This chapter draws on Irish Revenue annual reports, presentations and tax briefings, the Taxes Administration Liaison Committee (TALC)[3] meeting minutes, OECD reports, public discourse and analyses the initiative in the context of relevant scholarly work. It reveals that the implementation of CC in Ireland has encountered many challenges (including resourcing constraints, a lack of data to assess its impact and an absence of timely review) but also resulted in several benefits for both the Irish Revenue Commissioners (Revenue) and participating taxpayers (including increased interactions between Revenue and businesses, which led to improved understandings of the

2 Initiatives including education, assistance, marketing and advertisement campaigns, the disclosure of information, and the use of IT to offer enhanced communications options to taxpayers, have been supported by various organisations including the International Monetary Fund (IMF), the United Nations, World Bank and the Organisation for Economic Co-operation and Development (OECD).

3 The Taxes Administration Liaison Committee (TALC) is the main forum in Ireland for formal interaction between Irish Revenue and tax advisers. Its members are from the Revenue, Irish Taxation Institute, Law Society and Consultative Committee of Accountancy Bodies – Ireland, and it is tasked with reviewing and making recommendations to achieve more effective and efficient administration of direct taxes, stamp duties and VAT.

commercial realities and challenges faced by both parties). This review of the Irish experience of CC raises broader questions worthy of further research including the motivations of tax administrations in the selection and adoption of new schemes; the performance measurement and management systems employed by tax administrations to assist them in planning, implementing and assessing initiatives; and the impact of CC on trust levels across the tax compliance triad of taxpayers, advisers and Revenue.

A more in-depth review of Irish CC would not only enhance our understanding of programme specific challenges, motivations and outcomes, but would also provide a broader understanding of the multiple variables at play in the design, adoption, evaluation and amendment of any similar initiatives in tax administrations.

Background and context

CC is a real-time compliance review process, whereby taxpayers voluntarily go beyond their statutory duties by working with tax administrators to resolve tax positions as they arise, before the tax return is filed. It is envisioned as a pre-filing conversation, which requires the upfront disclosure by the participant of all material tax issues, and a willingness to engage with the tax administration in resolving these issues. In order to justify the trust which is central to CC, taxpayers must demonstrate that there are sufficiently robust systems of internal control in place to support the completeness and reliability of disclosures made. This internal control system is known as the Tax Control Framework (TCF).

It was suggested that this new approach could result in benefits for both taxpayers and tax administrations (de Widt, 2017; de Widt, Oats & Mulligan, 2017; Freedman, Loomer & Vella, 2012). The ability to discuss business transactions and strategies, and their associated tax issues, with tax authorities in real time provides taxpayers with early tax certainty (with a corresponding reduction in tax risk). The initiative also promises a faster tailored response and a lower level of post-filing interventions. From the perspective of tax administrations, they stand to gain increased knowledge of the needs and behaviours of taxpayers, allowing them to tailor services and strategies to maximise overall taxpayer compliance. In addition, although the initial investment in establishing these initiatives may be significant, it was expected that resource efficiencies would emerge for both parties in the medium to longer-term. This would allow, inter alia, tax administrations to allocate resources to higher-risk taxpayers.

This new approach has been strongly supported by the OECD, who endeavoured to put some shape and a framework on this new concept through establishing a working group and publishing three reports which provide guidance in relation to emerging best practice (OECD, 2008, 2013, 2016). CC was first implemented in 2005, with the pioneering countries of Ireland, Australia and the Netherlands. It developed in parallel in several jurisdictions and, thus, has taken differing forms, in accordance with diverse legal and cultural frameworks. There has been a significant increase in CC initiatives introduced in tax administrations internationally in recent years. As noted by Szudoczky & Majdanska, over 30 tax jurisdictions worldwide had developed and/or implemented some form of CC by 2017 (Szudoczky & Majdanska, 2017). Although most of these initiatives are currently operating on a domestic level, the launch of the OECD International Compliance Assurance Program (ICAP) pilot in January 2018, and roll out of the second pilot phase in March 2019, represents the expansion of the scheme to specific cross-border arrangements.[4]

However, there has been relatively little critical analysis carried out on how CC programmes are functioning in practice. The relatively small number of studies carried out have noted many challenges in practice, including the lack of data to assess the impact of the initiatives and the limited extent of monitoring by tax administrations (Bronzewska, 2016; Dabner, 2012; de Widt & Oats, 2017; Freedman, 2011; Hambre, 2019; Osofsky, 2012). Concern has also been expressed about the relationship between transparency and trust, with caution being urged particularly in the context of large corporates (Freedman, 2018, p. 121). Questions have also been raised in relation to whether CC is consistent with the principle of legal equality (Majdanska & Leigh Pemberton, 2019) and

4 ICAP aims to facilitate open and co-operative multilateral engagements between multinationals and tax administrations to provide early tax certainty and assurance. The initial pilot in January 2018 included eight tax administrations; Australia, Canada, Italy, Japan, the Netherlands, Spain, the UK and the USA. Ireland is a participant in the second pilot which was announced in March 2019. The scope of ICAP is more limited than CC in that the first pilot only covered two types of cross-border tax risk i.e. transfer pricing and permanent establishment risk. The second pilot covers a wider range of risks, including hybrid mismatch arrangements and withholding taxes.

European Union (EU) State Aid rules (Szudoczky & Majdanska, 2017). Despite these concerns, CC has been expanded to cross-border arrangements (via ICAP, albeit restricted application to a smaller range of tax risks) and, in some cases, to other taxpayer groups.[5]

The Irish CC journey

The Irish "Co-operative Compliance Framework" (CC) was introduced in 2005 and was one of the first CC initiatives implemented globally. This section presents the Irish CC journey to date, as depicted in Figure 5.1 below.

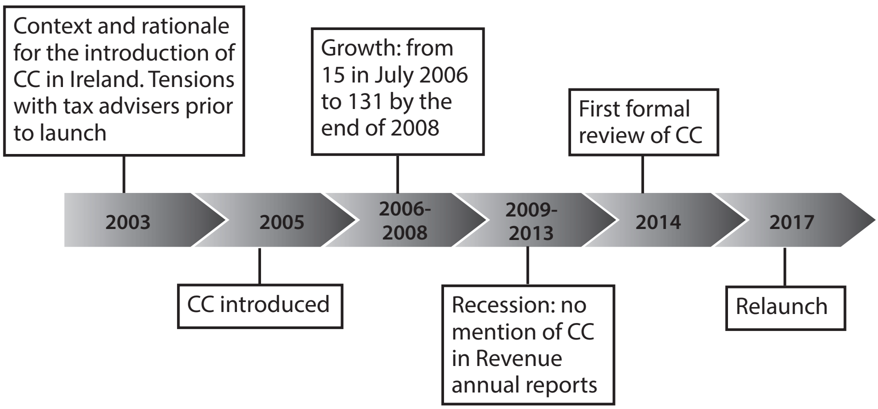

Figure 5.1: The Irish CC journey to date

Context and rationale for the introduction of CC in Ireland

CC was introduced in Ireland in the context of an extensive internal restructuring programme. In 2003, Revenue formed a specific dedicated unit for large businesses and high net worth individuals, the Large Cases Division (LCD). The reorganisation was a move away from a traditional tax-head focused structure to a more holistic risk-focused approach, which centralised all information about any one taxpayer for all tax-heads in a single division, to facilitate a better overview of their total tax position. These themes of restructuring, 'customer' focus and an increased emphasis on performance measurement are principles of a broader change in

5 CC has already been expanded to SMEs in The Netherlands, and it is noted that "Tax and Customs Administration has, in its administrative enthusiasm and fervour, underestimated issues such as the consequences – and, above all, the complications – of the rollout of horizontal monitoring to include the SME segment" (Stephens, 2012, p. 5). Stephens. (2012). Tax supervision – Made to measure.

approach which was taking place in public administration generally. In Ireland, these New Public Management (NPM) ideas had been replacing old style public administration since the early 1990s.

This focus on large taxpayers was part of a wider move internationally to include dedicated large taxpayer units in tax administrations. Beginning in the 1980s, the International Monetary Fund (IMF) had recommended that member countries establish large taxpayer units to increase control and improve large taxpayers' compliance. The perception was that even small changes in the tax returns of these particular taxpayers could have a significant impact on revenues.[6] In addition, the Irish Revenue believed that public perception of the fairness of the tax system as a whole was influenced by the compliance behaviour of the largest taxpayers.[7] However, the appropriateness of CC in addressing these issues could be questioned. The Irish CC was only made available to a small number of low-risk, largely compliant, corporates, and questions have been raised about the link between CC and public perceptions of fairness. Freedman notes that, in the United Kingdom (UK), CC had the opposite effect and actually undermined public trust in the tax system as it created a perception of close relationships between tax administrations and big business (Freedman, 2018).

In 2004, the LCD adopted a new strategy of proactive engagement with large companies with the aim of positively influencing corporate compliance behaviour. The new CC was founded on the idea of Revenue and businesses working together to foster a high compliance culture in exchange for a tailored, timely Revenue response. Importantly, the initiative has no statutory foundations, and instead relies on the voluntary espousal of the core ideas of mutual trust, understanding and transparency.[8] Similar to Ireland, other countries' experiences doc-

6 The Investment Climate Advisory Service notes that "Large taxpayers generally comprise less than one percent of all taxpayers in a country but typically contribute over 50 percent of tax revenues. For this reason, special units to deal with large taxpayers are of great importance to revenue collection" (Investment Climate Advisory Service, 2009, p. 88). However, these figures appear to be based on both individuals and companies, and CC initiatives have focused predominantly on companies only.

7 "It is also based on a belief that the compliance behaviour of those at the top of the taxpayer scale impacts significantly on how the general body of taxpayers view the whole tax system" (Irish Tax Review, 2004).

8 The OECD note that, like Ireland, most countries implementing CC have not had to amend existing laws. "Instead, the majority of countries formalise the co-operative compliance in some kind of agreement with taxpayers" (OECD, 2013, p. 31).

umented in the literature note CC initiatives are primarily targeted at large corporate taxpayers, to the exclusion of individuals and smaller businesses,[9] and taxpayers are generally either invited to participate by tax administrations or can voluntarily opt-in to the scheme (the UK being a notable exception). Thus, CC is not accessible to all and this has led to concerns that it may be inconsistent with the principle of legal equality (Majdanska & Leigh Pemberton, 2019) and EU State Aid rules (Szudoczky & Majdanska, 2017).

Revenue's stated objectives for CC were to promote a collaborative, mutually beneficial approach to compliance; facilitate more efficient use of business and Revenue resources; reduce tax uncertainty; and promote a relationship between Revenue and business based on trust, mutual understanding, openness and transparency. They claimed that both Revenue and companies would benefit. For companies, it was contended to result in tax certainty, a faster tailored response from a dedicated Case Manager and a lower level of interventions. For Revenue, the aim was to obtain an increased knowledge of businesses and industries and realise resource efficiencies which could be directed to more high-risk areas.

Despite the claimed benefits for taxpayers, Revenue were the primary drivers for the introduction of the initiative, with some concern being expressed by both taxpayers and tax advisers. Studies of other CC initiatives have noted differing motivations and drivers for the introduction of the scheme. According to de Widt et al (2017), CC programs were introduced in the Netherlands, United States (US) and UK to address growing tensions between corporate taxpayers and tax administrations in an environment of increased regulatory pressures. However, the instigators of the change were predominantly the tax administrations in the case of the UK and the Netherlands, whereas in the US some corporate taxpayers were demanding changes in how they were being treated, which arguably were delivered in part through CC.

In summary, there were several reasons put forward by Revenue for the introduction of CC in Ireland in 2005. It was a part of an overall restructuring, informed to some extent by NPM principles, to facilitate an increased focus on risk management and overall efficiency. In addi-

9 It should be noted,that the Netherlands have included SMEs in their CC program and were criticised for underestimating the complications this would bring (see footnote 5).

tion, as one of the first countries in the OECD to implement a specific CC program, it could enhance its position within the OECD as an innovative and leading tax administration. The latter rationale, arguably the pursuit by the tax administration of legitimacy internationally, also applies to other tax administrations (Boll, 2017; Braithwaite & Wirth, 2001; Larsen, 2016).[10]

Tensions with tax advisers prior to launch of CC

In Ireland, as in most developed countries, tax advisers play an important role in the tax affairs of large corporates. The formal interaction between Revenue and tax advisers is mainly supported through TALC.[11] In May 2005, Revenue presented a draft CC document at a TALC meeting, which proposed that participants would enter a Compliance Framework Agreement, which would set out what both Revenue and the taxpayer undertook to do in order to achieve a high tax compliance standard.

Tax advisers raised several concerns about the proposed CC, including Revenue's emphasis on working directly with large corporate taxpayers (with the implied exclusion of tax advisors) and its intention to use the scheme to tackle tax-planning schemes. Tax advisers contended that it was not Revenue's place to determine the legal application of the legislation, but rather this was the role of the courts. Further concerns included the need for a formal legal agreement, the cost to businesses of participating and the issue of the scheme creating a "two-tier" level of service (with CC participants receiving a higher level of service to those who chose not to participate). Indeed, Sean Moriarty (then Assistant Secretary of LCD) had advised "we will try to bias whatever resource we have available to help with interpretation towards companies who

10 International recognition was clearly a motivation for the Australian tax office in pioneering the approach. A working paper notes that "When the Tax Office gets international recognition for being at the cutting edge of the compliance management of large corporations and high wealth individuals, it will bring the Australian people with it" (Braithwaite & Wirth, 2001). Boll analyses the adoption of CC in the Netherlands and argues that "it seems highly plausible that the adoption and incorporation of the Tax Governance program has to do with how the tax administration becomes legitimate in the eyes of taxpayers and politicians" (Boll, 2017). Larsen also notes that the "too hastily launched" Swedish CC scheme was introduced following visits to the Netherlands and Ireland to learn from their experiences. She observes that "even among tax administrations there is a certain competition and no one wants to be left behind" (Larsen, 2016, p. 13).

11 See footnote 3.

have agreed compliance frameworks with us" (Moriarty, 2004a).

These discussions between Revenue and tax advisers in relation to the proposed CC took place against a background of growing tensions between both parties regarding the proposed ways of dealing with large taxpayers via the new LCD division. In response to Moriarty's article explaining how LCD would operate, two Ernst & Young tax partners set out their concerns about the new approach. They noted a conflict of interest in that "an agreed framework of compliance…blurs the role of Revenue from that of enforcing our tax laws to a person who is advising taxpayers, directly, on their tax affairs" (Henehan & Walsh, 2004). They also noted a "fundamental flaw" in that Revenue was not treating taxpayers equally. Further, they disagreed with the new emphasis on taxpayers dealing directly with Revenue and claimed that it could result in a "wedge of suspicion" being forced between tax advisors and taxpayers, and that their services were being attacked. They strongly urged companies to reject the new approach.

In May 2004, tensions continued to build with the publication of an article in Business & Finance (Ireland's leading business magazine) which compared the anti-avoidance unit in LCD to the A-Team: "Found a clever way to avoid paying taxes? Beware! Revenue's answer to the A-Team may soon be on your case" (Moriarty, 2004b). The article also served to increase tensions between Revenue and tax advisers, by quoting Moriarty as saying, "A huge amount of what tax advisers do is absolutely legitimate". Tax advisers felt that this could be taken to mean that at least some of what they do is not "legitimate". Matters continued to escalate with suggestions being made by Revenue's Chairman that the current Revenue powers were ineffective for dealing with tax advisers, with the implication that more may be introduced. In July 2004, the Irish Tax Institute's (ITI)[12] president issued a public statement reacting strongly to any suggestion that tax advisers were complicit in tax evasion. These interactions between Revenue and tax advisers, at the time of the establishment of LCD and CC, raise questions about the levels of trust between them. This is particularly noteworthy, as trust has been identified as a key requirement for the successful functioning of CC schemes (Mendoza & Wielhouwer, 2015).

12 The Irish Tax Institute is a representative and educational body for tax in Ireland. It is the only Irish professional body exclusively dedicated to tax.

2005: Launch of CC in Ireland

The final version of the CC document, entitled 'The Co-operative Approach to Tax Compliance' was published on Revenue's website in October 2005. This document differed from the original proposed framework, as Revenue had taken into consideration some, but not all, of the concerns raised by taxpayers and tax advisors. Addressing some of their concerns evidenced at least an element of co-operation in defining the features of the scheme.

The main amendments made included the removal of the requirement to sign a CC agreement, with Revenue accepting that action points would be agreed by way of letter instead;[13] the inclusion of a reassurance in the document that "What co-operative compliance is not, is any kind of special treatment for an elite group of taxpayers"; and a change in emphasis from participants being heavily discouraged from involvement in aggressive tax planning strategies, to a requirement for open and full disclosure of tax planning strategies.

Similar to CC schemes introduced elsewhere, the key features of the CC launched in 2005 in Ireland included voluntary participation, with specific low-risk corporates being invited by Revenue to join; a requirement for annual tax risk management plans; and a dedicated Case Manager being assigned to manage the relationship and respond promptly to queries from participants. Revenue advised they would invite specific companies within LCD to become involved in the scheme, with a view to extending the scheme to other companies in the future. By the end of 2005, 25 businesses had agreed to participate in the scheme.[14]

2006-2008: Growth of CC in Ireland

By the end of 2006, 46 businesses were formally participating in CC, with another 20 companies at an advanced stage of discussions. By the end of November 2007, the number participating had increased to over 80. In 2007, Revenue's Chairman noted that the initiative was "providing a valuable channel for constructive dialogue" and "building an environment of trust" (Daly, 2007). He acknowledged the need for a return on

13 The OECD notes that "the majority of countries formalise the CC in some kind of agreement with taxpayers". Only "a few countries" do not require a formal agreement (OECD, 2013).

14 The pilot programmes run in other jurisdictions had similarly low numbers, e.g. Australia (50), USA (17), The Netherlands (40) and France (11).

investment for both taxpayers and Revenue, although how and when this return would be measured was not addressed. The scheme would not be reviewed until 2014, nine years after its introduction.

By the end of 2008, 131 companies were engaged in the CC.[15] In the 2008 Annual Report, Revenue claimed that the initiative was "worthwhile" and "successful" (Revenue, 2008, p. 36). However, no formal review of the scheme's effectiveness had yet been carried out (OECD, 2008). In the report, Revenue contended that the experience to date had been positive, with the scheme proving an effective channel for constructive discussions between participants and Revenue, whilst fostering an environment of trust and openness. It further claimed that the scheme was offering an opportunity for Revenue to gain a better understanding of the needs and behaviours of large businesses. This new knowledge was being used to further develop and hone Revenue's strategies to improve compliance. Despite no formal independent review having yet been carried out, Revenue claimed that feedback on a case-by-case basis had been positive.

2009 to 2013: Recession

Despite the 2008 report stating the CC was proving successful, the Revenue annual reports for the next five years make no mention of the scheme. In late 2008, Ireland fell into recession for the first time since the 1980s and the subsequent five years proved very challenging with significant impacts on Revenue organisationally and operationally. One of the most difficult internal issues Revenue encountered was the loss of over 500 staff in a single year. The corresponding loss of expertise and corporate memory presented significant challenges. Staff losses, redundancies and cost-cutting measures continued through 2009, 2010, 2011, and 2012. This may explain the apparent lack of focus on CC in this period.

Ireland did, however, provide information to two OECD reports in 2009 and 2013 about the on-going development of the program. In the 2013 OECD report, Revenue admit that no formal review of the CC had yet taken place but claimed they had carried out an informal evaluation

15 For the purpose of international comparatives, the US Compliance Assurance Process (CAP) had similar numbers of participants, beginning with an initial pilot of 17 companies, growing to 174 by 2017. However, the Irish figure of 131 companies clearly represents a much larger percentage of corporate taxpayers in Ireland (Revenue, 2008).

and a formal review was planned for 2013. Despite the lack of formal review or evaluation, the report contends that "In Ireland, the approach and methods of introducing and implementing the co-operative compliance approach proved to be very successful" (OECD, 2013, p. 81).

2014: First review of CC

In 2014, nine years after the introduction of CC, Revenue carried out the first formal review of the scheme. That this review only took place nine years after CC had been introduced is surprising, particularly given that timely review and ongoing cost/benefit analysis was acknowledged as being important by Revenue's Chairman in 2007.[16]

The review was initiated, designed and carried out by Revenue and involved them gathering and analysing feedback from all three key parties affected by the initiative i.e. taxpayers, tax advisers and Revenue. Taxpayers and advisors were invited to complete surveys, internal interviews were conducted with Revenue Case Managers and best international practice was also evaluated. It is welcome that feedback was sought from all three parties. Nevertheless, it should be noted that the review was initiated, carried out and reported on by Revenue. In contrast, the US CC program was independently evaluated by the Treasury Inspector General for Tax Administration, and the Dutch program was reviewed by an independent committee formed specifically for that purpose.

The main issues and benefits identified by Revenue's review are summarised in Appendix A. These included resourcing constraints, difficulty in measuring the impact of the initiative, and inconsistency in its application, but the review also noted CC had increased interactions between Revenue and participating businesses, which had a positive effect on the relationship and increased understandings of the commercial realities and challenges faced by both parties. Similar challenges and benefits have been noted in the implementation of other

16 It should be noted, however, that the Irish CC is not the only CC initiative lacking timely review. The Dutch Horizontal Monitoring initiative was first reviewed 6 years after its introduction and the US CAP program was first assessed by the IRS in 2016, with amendments made in 2019. In 2013 the US Treasury Inspector General for Tax Administration noted that "despite the fact that the CAP pilot program ran for six calendar years and the permanent program is in its second calendar year of operation, the LB&I Division has yet to develop and implement a plan to thoroughly evaluate CAP data" (TIGTA, 2013, p. 2).

CC schemes globally. Notably in the Irish context, no marked reduction in compliance costs for participants was evident. In fact, in some instances where CC had not worked well, compliance costs had actually increased. These increased participant compliance costs were predominantly due to the cost of dealing with protracted audits and queries. The impact of CC on costs of both taxpayers and tax administrations has not yet been empirically proven. It has been contended that CC may lead to increased costs in the initial stages of the program, with efficiencies realised at a later stage. However, there has been no research conducted to determine when, and in what quantum, these efficiencies emerge (IRS, 2018a; TIGTA, 2013).[17]

In December 2016, Revenue presented the outcome of the CC review at the main TALC meeting. The presentation acknowledged that there were several issues with the current version of CC including a lack of clarity in relation to what the scheme involved, a lack of consistency in its application and a lack of distinction between those who are 'in' the scheme and those who are 'out'. However, notwithstanding the considerable range of issues identified, Revenue were determined to continue with CC. Some minor changes were made to the programme, which Revenue argued addressed some of the issues raised, and CC was relaunched and opened up to all eligible LCD corporates. Letters were issued in January 2017 to all LCD corporate groups inviting them to apply for the relaunched scheme.

The Irish CC is not the only CC program to be amended recently. The UK launched a revised business risk review model in October 2019[18] and the US CAP program was 'recalibrated' in September 2018 to

17 A review of the US initiative suggests it is a significant drain on IRS resources. The US CAP recalibration discussion document notes that "While progress has been made in several areas, hours charged and months spent have been much greater than expected resulting in a program that, on an average return basis, is more resource intensive than normal post-filing examinations of similarly sized taxpayers" (IRS, 2018, p.2). However, exact monetary figures have not been disclosed. Investment amounts have also not been made publicly available for Ireland. This lack of data appears to be a common issue internationally, e.g. a review of the Dutch Horizontal Monitoring program noted that the contention that implementation costs for the tax authorities would decrease over time had not been proven, and the committee has received "insufficient reliable data to test this hypothesis in all segments in which horizontal monitoring is employed" (Stevens et al., 2012, p. 120).

18 https://www.rsmuk.com/ideas-and-insights/tax-voice-october-2019/hmrcs-new-business-risk-review

address its resource-intensive nature (de Widt, Mulligan & Oats, 2019). However, whereas the US program was amended to restrict access to the program, the Irish CC was opened up to all LCD companies who meet the entry criteria.

2017: Relaunch of CC – What changed?

CC was relaunched in 2017, with a small number of changes including the opening of the programme to all eligible LCD companies and removing Case Managers from non-participating companies. The entry criteria restrict access to companies with at least three years history of good compliance (see Appendix B). Similar to CC in other tax jurisdictions, it continues to be only available to certain (large, corporate and already compliant) taxpayers. Importantly, relaunch documentation draws a clear distinction between those companies opting to be 'in' the scheme, and those companies choosing not to participate (i.e. 'out'). Although, each business may choose whether to participate, Revenue were explicit in stating that one of their objectives was to achieve resource efficiencies within the scheme, which would enable them to focus more resources on higher risk taxpayers (e.g. those companies deciding not to participate). Thus, should a company decide not to join CC, they were likely to find themselves the subject of a greater level of Revenue scrutiny and interventions. In addition, all LCD companies would have previously benefited from the service of a dedicated Case Manager. However, this 'privilege' would now only be retained by those large companies who participate in CC. Direct caseworker access was withdrawn for non-participants from April 2017 with only a general enquiry channel being made available to them for future interactions with Revenue. To further clarify the benefits of the scheme to companies, Revenue emphasised that, for those who opted to join CC, audits would only be carried out in exceptional circumstances, the tax refund process would be streamlined, and participants could benefit from an annual meeting with Revenue, with customs and transfer pricing staff attending where relevant.

Whilst changes to the original scheme were few in number, Revenue has been quite clear on the different treatment being given to those companies within CC as opposed to those who do not join. Revenue did not provide any justification of the specific amendments made, or an explanation as to how these amendments would address all of the many challenges identified in the review. By way of international comparison, the US Compliance Assurance Process (CAP) program followed a similar trajectory, in that it ran a pilot program with 17 participants for six years, and then made the program permanent and opened CAP up to all companies in 2011 (subject to meeting certain entry conditions). However, a review in 2013 questioned whether CAP was realising the resource efficiencies it envisioned, and whether this was impacting on the resources available to audit non-participants (TIGTA, 2013). The CAP program did not accept new taxpayers on to the program for 2018 and 2019, and, in 2020 and 2021, new applications are only being accepted from publicly held c-corporations with approved tax control frameworks. Recent changes to the program have focused on realising resource efficiencies within the program (IRS, 2018b).

By May 2019, 111 company groups were participating in the relaunched CC, approximately 25% of all eligible groups. However, questions continue to be raised about the benefits of the scheme for participants (McCaughren, 2019), with Revenue promising to review the CC in 2019.[19] At this time, the results of this review have not yet been revealed, nor has it been confirmed whether it has taken place.

Discussion

The Irish CC experience reveals a lack of timely review of the scheme. Tax administrations have limited resources and whilst new initiatives are necessary and should be encouraged, some work very well, some do not, newer and better ideas emerge and it is important that tax administrations operate with the best possible suite of programmes deemed appropriate at the time. Ongoing reviews and evaluation are important in this context. Notwithstanding uncertainty in relation to the appropriate performance management system to measure the impact of CC as noted in previous studies (de Widt, 2017; Job et al., 2007), it is somewhat concerning that the guidelines published on Revenue's website following the relaunch in 2017 do not include any commitment to more regular monitoring of CC. Revenue relaunch documentation provides limited details on the internal monitoring methods proposed by Revenue, noting their intention to measure effectiveness through the number and

19 Meeting between Irish Tax Institute/Revenue Large Corporates Division (LCD) 1 May 2019.

nature of self-reviews, self-corrections and unprompted disclosures made by participants. However, it is unclear whether these measures are either appropriate or sufficient. The success, or indeed failure, of any initiative can only be assessed if outcomes can be measured. Thus, there is a need to evaluate the tools and frameworks employed by tax administrations to assist them in planning, implementing and assessing initiatives.

Trust between taxpayers and the tax administration is a critical cog in the wheel of a sustainable tax system in practice (Freedman, 2018, p. 126). The removal of Case Managers from large cases not participating in the relaunched CC may prove problematic in this context. Interaction with tax officials can affect tax morale more generally (Freedman, 2018), and levels of social interaction impact on trust (Hoffman et al., 1996). The importance of these Case Managers in keeping channels of communication open between corporates and tax administrations has been noted in the UK (Freedman et al., 2014). Imposing a loss of personal contact upon companies who do not opt into CC may have an untended impact on trust. It has been noted that trust is multi-layered, and increased trust between a tax administration and one group of taxpayers, can decrease the trust of other groups (Freedman, 2018). A strategy to enhance trust with corporates with a history of high compliance, and decrease it with companies who do not meet the criteria to join CC, or simply prefer not to, may have unintended impacts on their compliance behaviour.

The Irish experience of CC also highlights the important role of trust between tax advisors and Revenue. The 2005 scheme generally failed to win the support of tax advisers, which may in part explain the relatively low numbers of corporates opting to join. CC was introduced at a time when arguably the trust level between Revenue and tax advisers was not as it should be. Yet, trust has been identified as a key requirement for the successful functioning of CC schemes. Unfortunately, the relaunched CC has not apparently enhanced this trust. In fact, in response to the relaunch of CC in 2017, Brian Keegan, director of public policy and taxation at Chartered Accountants Ireland, warned that: "Cooperative compliance is dangerous because it creates an elite class of taxpayers… If one taxpayer is 'close to Revenue' then by definition; other taxpayers are not 'close to Revenue'. There is no place in a democracy for Revenue authorities to treat one taxpayer better than another" (Keegan, 2017). Questions remain to be answered about the impact of the ongoing CC on trust levels across the tax compliance triad of taxpayers, advisers and Revenue. This exploration of the Irish CC scheme also raises questions in relation to the external forces at play when tax administrations consider adopting innovative programmes. Boll contends that the Danish tax administration "experienced direct and indirect coercive pressures from politicians and authoritative organisations such as the OECD and IFA" (Boll, 2017, p. 223). The role of the OECD in encouraging the adoption of initiatives, and the usefulness of OECD guidance and frameworks (e.g. the seven pillars) is also worthy of further investigation. Clearly, being one of the first to introduce any OECD supported initiative (such as CC) brings its advantages and disadvantages which must be carefully considered by tax administrations.

Conclusion

The Irish Revenue was one of the first tax administrations to introduce CC and, 15 years since its adoption, this chapter provides a timely analysis of the Irish experience of CC in practice. This exploration of Irish CC reveals that it has resulted in some benefits but also encountered many challenges, and raises broader questions worthy of further research. These areas include the motivations of tax administrations in the selection and adoption of new schemes; the performance measurement and management systems employed by tax administrations to assist them in planning, implementing and assessing initiatives; and the impact of CC on trust levels across the tax compliance triad of taxpayers, advisers and Revenue.

In conclusion, there is much yet to be learned through a more in-depth analysis of CC in Ireland. Not only would such an analysis assist in shining a light on programme specific challenges, motivations and outcomes, but it would also provide a broader understanding of the multiple variables at play in the design, adoption, evaluation and amendment of any similar tax administration initiative.

Appendix A

Table 5.1: Revenue's view of the issues and benefits of CC[20]

Issues from Revenue's perspective

- Engagement could often be one-sided, with issues arising which had not previously been signalled by the business. The level of openness and engagement of some businesses was low.
- Although Revenue provided pre-notification of the possibility of audit, the self-reviews performed by businesses following notification could be poor. Overall, there was a low number of unprompted disclosures and most disclosures were prompted.
- Revenue's limited levels of resources and staffing issues led to challenges in adequately servicing the programme.
- Some businesses were using the service for low-level queries which was not the purpose of the scheme.
- Lack of distinction and differentiation between companies engaging and those not engaging in the scheme.
- The success of the programme was difficult to measure.
- There was a poor level of take-up, with Revenue stating that they felt that taxpayers had "largely abandoned the scheme".
- The lack of legal agreements created a level of uncertainty.

Benefits from Revenue's perspective

- Fewer mistakes and issues with participants' tax returns when filed.
- A greater understanding among participants of the consequences of non-compliance.
- Involvement of Revenue in discussions before transactions were undertaken.
- Quicker dispute resolution through better access to key non-tax personnel.
- Increased knowledge through the Case Worker gaining insights on corporate governance ethos, and understanding of issues facing the industry, in addition to company-specific issues.
- More efficient management of risk.
- More efficient resource management where self-review lead to unprompted disclosures (though it was noted that there was a low level of unprompted disclosures overall).
- Encouraged two-way openness, trust and transparency.

20 Information drawn from Revenue presentation to TALC "Outcome of Review of Co-operative Compliance Framework" on 13 December 2016 and presentation by Eugene Creighton on LCD to ITI on 2 October 2014.

Table 5.2: Tax Intermediary and taxpayer views of issues and benefits of CC[21]

Issues raised by tax advisers and taxpayers

- The restriction on entry to the scheme, as Revenue reserved the right to choose which businesses would be invited to participate. This reinforced the idea of inequity and Revenue treating one taxpayer better than another.
- The experience of CC had been varied across all LCD sectors. There appeared to be inconsistency in how it was being applied. In some cases, it had worked well. In others, the initial effectiveness of the scheme had decreased in recent years due to reduced technical support and responsiveness of Case Workers. Some participants' experience was that it did not work well in their case. The ITI noted that "A relaunched Revenue Cooperative Compliance Framework needs to focus on providing an open, responsive engagement platform resourced by dedicated relationship managers who are commercially aware and will liaise with these larger taxpayers and their advisers."
- There was a low level of awareness of CC by companies in LCD not participating in the scheme. There was also a lack of clarity around the benefits of participating, with no clear distinction between being "inside" and "outside" the scheme.
- Survey feedback indicated that there was no marked reduction in compliance costs for participants. In some instances where CC had not worked well, compliance costs had actually increased, predominantly due to the cost of dealing with protracted audits, interventions and queries.
- Some participants felt they were subject to a higher level of scrutiny and intervention than their competitors who chose not to participate in the program.

Benefits for taxpayers identified in the surveys

- No requirement for a formal legal agreement. Companies typically dealt with by LCD comprise listed companies, large private companies, State owned bodies and regulated entities, the majority of whom are subject to formal compliance statements under the Companies Acts, or similar obligations. To introduce a separate formal agreement could lead to duplication of effort and would not seem warranted.
- The voluntary nature of the scheme encouraged trust, openness and engagement. The survey raised questions in relation to restricting access to the program, having formal consequences for non-participation, possible legislation and written agreements. However, the submission by the ITI noted "It is difficult to see merit in introducing a legislative basis for co-operative compliance. This could

21 Information drawn from responses from The Consultative Committee of Accountancy Bodies – Ireland to CC survey 28 July 2014; responses from the Irish Taxation Institute to CC survey 31 July 2014; presentation by Eugene Creighton on LCD to ITI on 2 October 2014 and Revenue presentation to TALC "Outcome of Review of Co-operative Compliance Framework" on 13 December 2016.

result in duplicative work for business in providing information to Revenue. This would increase compliance costs with no corresponding benefit to the Exchequer. A positive approach of encouraging participation is more likely to engage taxpayers and promote active involvement."

- Greater certainty in relation to tax risk due to increased technical support and a positive working relationship with Revenue.
- Where there was continuity of Revenue personnel handling the case, strong technical support, responsive case management, and a structured and focused approach to raising queries and scheduling audits, these contributed to a positive experience.
- The ITI note that involvement of tax advisors in the process can be beneficial, "This ensures that all parties are fully aware of any issues arising and ultimately will reduce the level of tax risk."

Appendix B

Table 5.3: Entry criteria for 2017 CC

- All group companies must have filed all returns for all taxes and duties for which they have an obligation to submit, and all tax and duty liabilities must be up to date.
- Within the last three years, no company in the group has had a settlement under the Audit Code of Practice with a penalty of 15% or more (this settlement test does not apply if the full payment i.e. tax, interest and penalty, does not exceed 1% of the overall group's tax payments in the calendar year of the settlement).
- If settlement was made within the last 3 years, confirmation must be given that new controls have been implemented to prevent future occurrences of the same or similar issues.
- Confirmation must be given that, in the last 3 years, no group company has been found to be non-compliant with a Customs or Excise authorisation or licence.
- Confirmation must be given that the group has the broad principles of a tax control framework in place. Although, Revenue have confirmed that if the taxpayer confirms that a tax control framework will be put in place, this confirmation will be sufficient, and the control framework can be examined at a later stage.

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6 A Study of the UK Tax Credits system: Transforming Citizens into Self-responsible Individuals at the Frontline of Tax Administration

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Abstract

This chapter contributes to conceptual and empirical understandings of tax administration in tax and public sector accounting research by analysing how accounting technologies enact relational power during encounters between tax authority (HMRC) workers and citizens. It examines the administration of the UK tax credits system, which was designed to alleviate financial hardship for low-income families and workers, reduce child poverty and stimulate labour engagement. However, in practice its accounting technologies seem to be ill-equipped to engage with the lived reality of its target public and significantly worsen financial hardship of some claimants. This chapter draws on the work of Miller and Rose (2008) to view accounting as a technology of governance and Bartels & Turnbull (2019) to understand the relational processes of frontline encounters and their implications on individuals' lives. It applies ethnographic and grounded theory methods to explore the experiences and encounters of tax credits claimants and HMRC workers to show how accounting influences the work practices of HMRC workers, through relational processes, ultimately (re)shaping claimants' subjectivities and financial outcomes. Findings suggest that some tax credits claimants are not financially better off and are perversely held responsible and accountable for overpayment problems, facilitated through their encounters with accounting technologies. This chapter finds that the accounting technologies of the tax credits system dehumanise encounters between HMRC workers and claimants, transforming claimants into self-responsible individuals. This chapter argues that the tax credits system, as an accounting technology of governance, is not a welfare programme, but is a governing system which shifts responsibility onto claimants, making them

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self-responsible for their success in life. These findings highlight how the tax credits system underlies the targeting of tax credits claimants and sustains a neo-liberal discourse of private responsibility for financial hardship through its accounting technologies and everyday relational practices.

Introduction and background

> "I have experienced a nightmare with tax credits from day one, none of it down to my error. I have been left allegedly owing £19,670. I have received over 60 different award notices, all with different figures on them. It culminated in the break-up of my marriage after 21 years, and when they sent me an enforcement notice in November for the full amount of money, I had a complete breakdown and tried to commit suicide. I am still on anti-depressants now because of the trauma…Tax credits have ruined my life. Kim, Southampton, Tax credits claimant" (Voices of the Victims, 2011).

The new tax credits (TC) system was introduced by the New Labour government in April 2003. It was designed to help achieve the UK government's aims of reducing child poverty, encouraging people to work and providing financial support to working families (HM Treasury, 2000, p. 14). It replaced the Working Families' Tax Credits (WFTC) and promised to provide simpler and more responsive financial support for claimants without causing "unnecessary burdens" (HM Treasury, 2000, p. 19). Such projections of the new TC system became not only the expectations of government but also of claimants.

However, within a few years of its operation, around a third of tax credits claimants experienced financial difficulties as they found themselves having to repay some or all of their TC income to the HM Revenue and Customs (HMRC)[2], known as an 'overpayment'. According to the Parliamentary and Health Service Ombudsman (2007):

> "Almost a third of all tax credits awards had once again been overpaid, and almost half a million awards (494,000) had been overpaid by over £1,000; some 25,000 of those by over £5,000 […] Of most concern is that a significant proportion of those overpay-

2 Her Majesty's Revenue and Customs is the UK tax authority that administers tax credits in the UK.

ments (363,000) were again made to those on low or very modest incomes, where household income was less than £10,000. "

Overpayments became such a big issue it prompted the government to make an intervention[3] in April 2006 which resulted in a reduction in the number of overpayments to 19.77% in that same tax year (2006/07). However, the number of overpayments increased to 28.39% in April 2015 when the Conservative government made further changes to the programme.

This chapter is part of a bigger research project which explores the experiences of claimants claiming TC, getting and having to repay overpayments. Part of the research project was also to examine the experiences of HMRC workers who administer TC and engage with claimants at the frontline. The aim is to highlight the relational and dynamic practices that take place during encounters between TC claimants and HMRC workers. It demonstrates the effect of relational power during frontline interactions and how this effects claimants' financial and non-financial outcomes. To do this, this chapter first examines the first stage of a claimant's tax credits experience: when they find out about an overpayment. It examines the financial and non-financial effects of getting an overpayment on the real lives of claimants who engage with the tax credits system. It shows that contrary to its aims, the TC system worsens financial hardship for (at its highest) one-third of claimants. The chapter then examines what happens when claimants challenge their overpayments by interacting with HMRC workers. It demonstrates that HMRC workers are unhelpful and unempathetic towards claimants, resulting in some claimants giving up on challenging their overpayments and ending up repaying thousands of pounds to HMRC. The chapter then explores the experiences of HMRC workers in the workplace and offers insights into how these impact on their interactions with claimants. It finds an increased dependency on information and communication technology (ICT), and the strong focus on performance targets in the workplace, makes it difficult for HMRC workers to apply discretion and meaningful information and help towards claimants.

Whereas the TC system targeted the most socially and economically vulnerable citizens with the intention of improving their lives,

3 The government increased the disregard limit by ten-fold from £2,500 to £25,000 from April 2006.

it resulted in many claimants experiencing further financial hardship, emotional distress and considerable uncertainty as they lived in fear of receiving overpayments in future. Overpayments have a tremendous impact on claimants who have to find additional money to repay the overpayments and readjust their household expenditure by cutting back on basic costs such as food and heat. According to some reports some individuals chose to refrain from claiming TC (Revenue Benefits, 2015) because of its impact on their lives, whilst others fell into debt to help them through periods of financial difficulty (The Independent, 2014). It was also reported that some claimants suffered from anxiety, depression and contemplated suicide (Voices of the Victims, 2011). The consequences of the new TC system in reality go against its main aims by intensifying, rather than alleviating, the financial hardship of some claimants.

The main purpose of this chapter is to provide a critical examination, based on an interdisciplinary critical analysis, of everyday administration of a bureaucratic welfare programme, using the UK TC system as a case study; and to highlight how relational power manifests during everyday frontline encounters between TC claimants and HMRC workers which result in reinforcing stigma and inequality for some claimants. Most TC research examine TC by adopting a macro-level approach, most of which examine take-up rates, types of claimants and financial outcomes (Brewer, 2003; Brewer & Shaw, 2006; Brown, 2005; Brown at al., 2004; Greenstein 2005; Greenstein & Shapiro 1998; Holt 2006; 2011; O'Donoghue & Sutherland, 1999). This chapter examines the TC system at the micro-level, at the frontline of public services, to understand how relational power manifests in multi-directional, visible and invisible taken-for-granted ways through a web of humans, objects and ICT, and how it leads to subjectification (Foucault, 1982), in terms of influencing claimants' minds and behaviour. This chapter draws on main features from public administration (Bartels & Turnbull, 2019) and accounting (Miller & Rose, 2008) to explain how accounting technologies enact relational power and mediate interactions and exercise power based on a relational ontology (Closs-Davies et al., 2020).

In contrary to most existing TC research which adopt positivist and quantitative research approaches, I apply a methodological focus on emergent and dynamic properties, situated and evolving in sociomaterial networks. This chapter adopts a critical ethnographic (Dubois, 2009) perspective to reveal how the tax credits system operationalises relational power through daily frontline public service practices, worsening financial hardship and inducing feelings of low self-worth and disempowerment for some claimants. This chapter is based on an ethnographical collection and interpretation of multiple sources of data: interviews, participatory observations, documents, statistics, visual material and personal reflections. This approach allows the capture and examination of relational and dynamic practices between claimants, HMRC workers, materials and information and communication technology (ICT) to understand and explain complex human behaviour within the unique context of the TC field.

To sum up, this chapter provides an overview of a bigger research project which focuses on relational power that manifests through sociomaterial networks of bureaucracy and accountability. This chapter highlights the structural asymmetry in power relations between TC claimants and HMRC workers at the frontline which sustain neo-liberal discourse of private responsibility as claimants become more responsible for their financial hardship (overpayments). Such discourse is mobilised through the relational practices of front-line HMRC workers and TC claimants. As a result, their encounters worsen the financial hardship of some claimants, ultimately reinforcing feelings of low self-worth and disempowerment.

The next section discusses the conceptual framework of relational power that forms the basis of this chapter, followed by an explanation of the critical-interpretivist methodology adopted and how the ethnographic study was conducted. The chapter then presents its findings and offers further discussion, before it concludes by providing a summary of the findings and its implications for future social policy and administration and research.

Conceptual framework

This chapter adopts a relational approach to examine the dynamic processes through which relational power is enacted in practice. Recent relational approaches adopted in public administration (e.g. Bartels & Turnbull, 2019) literature offer a useful framework for analysing everyday practices in the tax credits (TC) field. In particular, Bartels and

Turnbull (2019) offer three core features to this approach. First, a 'relational ontology' that focuses on networks of relationships, interactions interdependence as a unit of analysis. By focussing on interactions within networks, this approach moves from viewing public administration "itself as interactive, dynamic, and situated" (Closs-Davies et al., 2020). Second, it adopts an "epistemological orientation to emergent properties". This approach does not view relationships as transactions between static entities; rather "their nature, meaning and value emerge from interactions between 'inter-actors' and dynamically shape who they are and what they do" (Closs-Davies et al., 2020, p. X). The third core feature is that it adopts a "methodological focus on dynamic, situated and evolving networks". By examining actors "being-in-relation with others, underlying mechanisms and meanings of complex flows of relationships and changing systems can be identified" (Closs-Davies et al., 2020). A key dividing line between relational approaches in public administration is whether they attach a normative value to relationality, i.e., the qualitative improvements emerging from well-formed relationships.

In contrast to sovereign power, which is centralised by the State and enacted through law and punishment, Foucault views the population to be governed as a 'biological problem', to which he refers to as 'biopolitics' (Foucault, 1976, p. 245). For Foucault (2008) technologies governing a population cannot be separated from human bodies and minds. This means that power of the State does not stem from the oppression of individuals. Instead, it manifests by exposing people to administrative mechanisms of public services. Foucault (1977) refers to such mechanisms as 'dispositif', which enact power on the body and mind. Dispositif operate beyond the State, and seep into various domains of social life, to include the home, workplace and community. Dispositif form a network of subtle relations to shape people in visible and invisible ways to benefit the State, and hence constitute the exercise of relational power (Miller & Rose, 2008, p. 10).

Foucault (1979) conceived the term 'governmentality' to explain the mechanisms of relational power through which individuals are subjected. According to Foucault (1996, p. 277) "individuals are subjectivised through 'multiple processes' that constitute power" which operate through the self and multiple other sources (dispositif). Governmentality is an "ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power" (Foucault, 1979, p. 20). It links political rationality (which this chapter views as making citizens self-responsible for their own welfare, tied together by a political ideology) to the behaviour and thinking of citizens through complex networks of power relationships, mediated by dispositif.

Dispositif, are not simple static instruments; rather, they manifest as calculations, procedures, devices, materials and actions (Miller & Rose, 2008). In this chapter, we pay particular attention to the relational networks formed between inscription devices, expertise, locales and centres of calculation. 'Inscription devices' are materials which make reality visible, stable and mobile. For instance, HMRC letters, notices and computer screens, which make citizens' lives visible and calculable. 'Expertise' refers to HMRC workers who draw their behaviour and actions on inscription devices and citizens (claimants). Such interactions take place at 'locales', which refer to HMRC offices and call centres, where expertise capture and monitor citizen information. Information is transferred between citizens, expertise and locales to and from 'centres of calculation', such as HMRC's ICT systems, with the aim of processing and subjecting individuals to calculation, evaluation, intervention, and thus control.

Miller and Rose (2008) advance this relational understanding of governmentality based on Actor-Network theory, which claims that "the qualities and capacities of both human and technologies […] are relational and performative constructs" (Andersen et al., 2018, p. 43). Thus, relational power operates through complex networks between human, inhuman and non-human actors that cannot be analytically separated (Callon and Latour, 1981; Callon & Law, 1997; Latour, 1986, 1987). Moreover, the success or failure of the network's survival depends on repetitive instructions that become taken-for-granted, eventually legitimised and normalised through ways of doing and saying (Closs-Davies et al., 2020). The network also depends on problems of one actor being resolved by another. The network is the 'emergent property' of the connection between humans, inscriptions, locales and centres of calculation which are so inherently linked through emergent processes, "no-one is in control or fully aware of it happening" (Closs-Davies, 2020).

The relational interdependence of actors in the network does not necessarily constitute "democratic and mutually empowering relationships" (Closs-Davies, 2020; Stout & Love, 2018). The dispositif within the networks can separate actors in manageable and calculable units (Chow & Bracci, 2020; Miller & O'Leary, 1987; Rose, 1991). Foucault (2003, p. 126) refers to this as "dividing practice" where "the subject is either divided inside himself [sic] or divided from others.", which isolates the subject within delimited boundaries, referred to as a "sphere of autonomy" (Rose, 1993). Thus, the individual becomes governed within the network in ways that link yet divide them.

In conclusion, the conceptual framework focuses on relational power to examine how relational power is enacted from interactive processes between the governed citizen (TC claimants), expertise (HMRC workers), inscription devices (HMRC letters and computer screens), locales (HMRC offices and call centres) and centres of calculation (HMRC's ICT system). It enables us to track in detail how these interactions (re) shape power relations and the financial and non-financial outcomes of tax credits claimants. The next section explains the critical-interpretivist ethnographic approach to this chapter.

Methodology

This chapter is part of a bigger research project to examine relational practices which take place during frontline encounters between tax credits (TC) claimants and HMRC workers. This project was carried out between 2013-2019 with the main aim of gaining a deep understanding of the financial and non-financial effects of TC administration on claimants. The project explored (1) how and why claimants suffered overpayments and its impact on their lives, (2) what happened during encounters between claimants and HMRC workers, (3) how HMRC workers administered TC, under what conditions and coping mechanisms, (4) how claimants responded to their encounters with HMRC workers and their consequences. This chapter provides a summary of each of these elements from the project.

This chapter adopts an interpretivist approach as it critically explores and understands the practices of tax credits participants in terms of their socially situated and interactively performed meanings. Critical ethnography is the method adopted. Following Dubois' (2009) study on frontline encounters in French welfare offices, the implementation of social policy and the effect of welfare encounters on recipients beg a critical ethnographic approach. Rather than reifying discourse or projecting its meanings on specific practices, this chapter takes an ethnographic approach to examining the everyday lives of people. Ethnography allows the research to be conducted ‘within’ the field (rather than studying people under certain conditions) which enables the capturing of deeper contextualised meaning and understanding (Fenno, 1986; Frissen, 1989; Geertz, 2000; Van Hulst, 2008). Ethnography can be used to examine discourse and establish the context in which it is set in (Oberhuber & Krzyzanowski, 2008) and thus provides a mode of study as an attempt to make sense of practices and processes within the social field. It allows an investigation into the way tax credits participants view their own socio-political realities within the field, and is reflected in the way they feel, act, talk and write.

The bigger research project collected data from interviewing tax credits claimants, HMRC workers, Citizens Advice workers, a Member of Parliament (MP), and an MP case worker. Data was also collected from observation of participants, fieldnotes, archives and documents collected during the fieldwork, such as HMRC letters and notices to claimants, HMRC advertising, political manifestos and speeches, newspaper articles and social media forums. The main source of data collection was unstructured interviews with participants. Claimants and HMRC workers were initially selected at random following advertising of calls for research participants, followed by a snowballing effect (Durose, 2011, p. 982; Erlandson et al., 1993). The project mainly relies on interviews with claimants (22 claimants) and not HMRC workers (four workers). There is a lack of interviews with HMRC workers and no observations of workers at work because of a reluctance by HMRC to collaborate with the research. The first and last interview questions remained the same for all interview participants.[4] Other questions remained open and flexible to the interviewees’ own story. It is important to permit the interviewee to talk about what they want to talk about (because this is what’s important to them) in their own words. This will always produce better data direct from the interviewees’ own experiences (Weiss, 1994). An interview guide ensured that relevant areas

4 The first and last questions were different between tax credits claimants and HMRC workers.

were addressed. 'Visualizaibility' was also used to ensure that I understood what was said (Weiss, 1994). The interviewee was encouraged to provide rich and concrete data by being asked to walk me through their experience from beginning to end, with as little interruption as possible.

During most interviews, certain questions and/or experiences triggered an emotional response from the interviewee. When this happened, the interview continued, because interruption may deprive the interviewee of expressing their natural emotions. Emotions are an important part of the research as they provide a deeper understanding of the claimant's experience. However, I was sensitive towards the subject from that point on, for example, by using a softer tone and being more patient towards the interviewee. If the interviewee became distressed, I gave the interviewee the choice whether to continue the interview until a later time, and if so, asked if they wanted the researcher to contact someone for support.

Interviews were recorded, transcribed and then analysed using grounded theory (Charmaz, 2006). Grounded theory analysis offers heuristics to analyse practice without predetermined theories and concepts. Grounded theory is a systematic process using flexible guidelines to analyse data. It involves an interactive process of going back and forth between data and analysis, so that the researcher becomes closely involved in the data and allows the emergence of analysis (Charmaz, 2006). Relevant themes and codes emerge during the process of data analysis. Thus, theories are not specific, detailed and fixed at the start of the research, rather they emerge from the data instead. This allows a deeper and richer understanding of the tax credits field, led by the experiences of tax credits participants. This process involved initial coding of interview transcripts, followed by memo-writing. Coding involves the labelling of data based on the researcher's view of what the data is telling her. Initial coding is temporary, transcripts are revisited and recoded when further data is analysed, so that codes are refined to best fit the data and memos are further developed (Charmaz, 2006). The next section presents and analyses the data findings.

Analysis and findings

This section discusses the data findings. It is presented in three parts. The first explains the government's aims when introducing the tax credits (TC) system in the UK, individuals' initial expectations and reasons for claiming TC, and real-life consequences of claiming TC. The findings show that although one of the aims of the TC system was to alleviate financial hardship for low-income families and workers, in reality the TC system worsens financial hardship for up to one-third of claimants in the UK. The findings further show that the way claimants find out about their overpayments cause some claimants to turn to debt, reinforcing feelings of victimisation and stigmatisation for claimants. The following two parts focus on encounters between tax credits claimants and HMRC letters and notices (inscription devices) and HMRC workers (expertise). The first of these parts examines what happens when claimants attempt to challenge their overpayments by contacting HMRC workers. The findings show that HMRC workers are unhelpful and unempathetic toward claimants. Consequently, disempowering claimants to want to challenge their overpayments, which ultimately worsens their financial hardship. The last part examines HMRC workers' experiences when dealing with TC cases and claimants enquiries. The findings demonstrate that HMRC workers are structurally disadvantaged to be able to help claimants in meaningful and humane ways, due to their working environment and office-based culture.

Aims and unanticipated consequences of tax credits

The UK's New Labour government announced its long-term goal of halving child poverty by 2010 and "to abolish it within a generation" (HMRC Treasury, 2002, p. 13). The government announced plans to reform its current benefits system, which was reported to be unresponsive to individual needs and had complex administrative processes (HM Treasury, 2002), by combining the tax system and benefit system. The objective was to 'streamline' and 'modernise' the 'interaction of the tax and benefits systems' and to provide a 'tailored' (HM Treasury, 2002, p. 4) financial support system to recipients. The new TC system was part of the government's strategy for achieving this. It replaced Working Families Tax Credits (WFTC) in April 2003 and was administered by the UK tax authority, Her Majesty's Revenue and Customs (HMRC).

The new TC system was designed to tackle poverty and also provide 'employment opportunity to all' (HMRC Treasury, 2002, p. 13). It operated two separate elements to achieve these goals: the working tax credits (WTC), paid to working individuals; and child tax credits (CTC), paid to (non)working individuals who have dependent children. Additional CTC is awarded when children are placed in childcare whilst the claimant is working (known as the childcare element).

When the TC system was introduced in 2003, it was advertised to the public mainly via television adverts and radio. Advertising campaigns contained certain rhetoric and phrases, such as "money with your name on it" and "if you've earned it, make sure you claim it", suggesting that tax credits money is available and easily accessible to claimants. In addition, government rhetoric used in political manifestos and budget announcements suggested that dealing with the TC system would be a seamless and straightforward process for claimants. Applying for TC is not compulsory nor automatic. It is the responsibility and choice of the individual to apply for TC.

All claimants that were interviewed smile and are excited when they describe how they feel when they found out about TC for the first time. This was the only time claimants would smile during most of the interviews. For instance, Alison[5] (employed, single, mother of two children) thought the tax credits system is "brilliant", believing TC would give her "a little extra" money that she believes she is "entitled to". Alison believes TC would "help" her. All interviewees wanted to, and were looking forward to receiving, TC at the outset.

However, within a few years of its introduction, a third of all UK claimants suffered an overpayment and found themselves having to repay some or all of their TC money back to HMRC, worsening their financial hardship (see Figure 6.1).

5 Interview participant information has been anonymised, and names replaced using pseudonyms, to protect their identities.

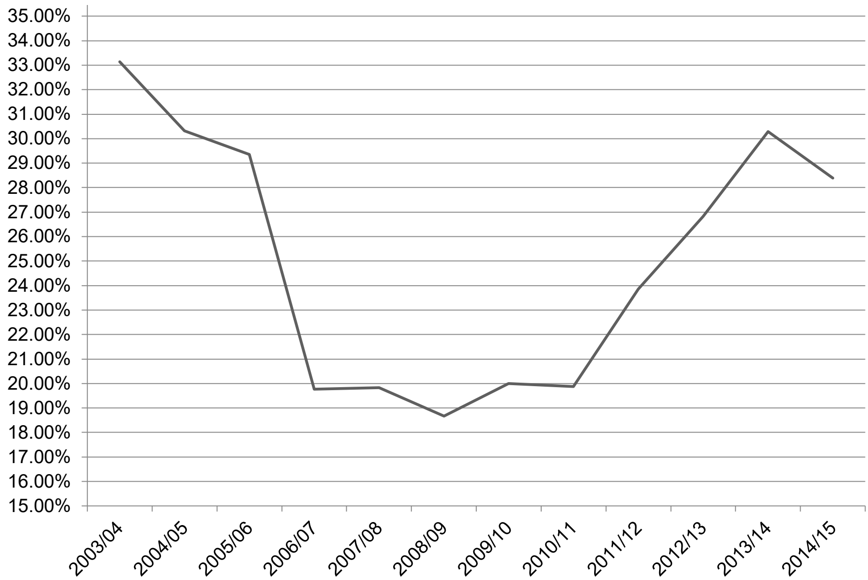

Figure 6.1: Percentage of overpayments to total number of awards.
Source: HMRC statistics

Figure 6.1 shows a significant drop in the number of overpayments in 2006/07. This was caused by the government intervention of extending the disregard limit by ten-fold, from £2,500 to £25,000. The disregard limit allowed claimant income to fluctuate within this limit without having to reassess a claimant's tax credits award and avoid triggering an overpayment. However, overpayments continued to be an issue for nearly 20% of UK claimants after 2006/07, which increased from 19.77% to 28.39% by 2014/15 when the New Coalition government reduced the disregard limit to £10,000 in 2011/12 and then £5,000 in 2013/14. According to HMRC statistics, the average annual overpayment value for one household stood at £1,028 in 2003/04. This is a lot of money for a low-income family to have to pay back. In 2006/07, when the disregard limit was increased, the average annual overpayment fell to £738, but later increased to £1,099 by 2014/15 (similar to the amount experienced in 2003/04 (£1,028)).

Nadia (employed, single, mother of two children) found out about her overpayment when she was at a checkout at her local supermarket with her children. Her bank card was declined when she was trying to buy food for her family. Her "heart sank". She was "embarrassed" and could not understand why she had no money, until she went to a local cashpoint and found out her TC money had not been paid into her bank account. She later found out that HMRC stopped her TC income because she had an overpayment and the TC income owed to her was being used to repay the overpayment. Nadia had no awareness of an overpayment, nor that HMRC had decided to stop her TC income to pay it back. She felt "depressed" and on the "verge of having a nervous breakdown". Nadia was advised to use her local Foodbank to feed herself and her children, but she is too "embarrassed" to use it. She says, "everyone will know I have no money. I have my pride".

Claimants also find out about their overpayments by receiving HMRC documents in the post. For instance, Caitlyn (unemployed, single, mother of two children) received her usual tax credits award notice (inscription device) in the post. But noticed that this particular notice showed a reduction in her tax credits payments. She says, "I couldn't understand why my tax credits were so low […] You're not prepared for it". Caitlyn had not prepared nor budgeted for her loss of income and had no savings to help her through it. She has to "cut back" on food and electricity usage. She says, it is a "stress on your life. The kids suss it out and they get all agitated and they play up when they see you stressed. The anxiety hits them as well". Caitlyn now "dreads" claiming TC and opening HMRC documents received in the post.

Other claimants have similar experiences. Hannah (self-employed, divorced, mother of two children) received an overpayment notice (inscription device) of £7,000, that "popped through the door" and caused an emotional "explosion", making her feel "fuming" and "mad". Tammy (employed, married, mother of two children) also received an unexpected overpayment notice from HMRC in the post that showed an overpayment of £12,000, which will take her nine years to pay back. Tammy found out about her overpayment when her second child was new-born and her husband was diagnosed with terminal cancer. Finding out about an overpayment was the "last thing" she needed. Kara (unemployed, married, mother of four children) was forced to choose whether to "eat or heat", and got into debt by applying for a "crisis loan". She says, there is "no guarantee what was going into your bank account. Therefore, it was difficult to budget" and made her feel "scared". Clara (employed, single, mother of two children) and her children are "living on beans on toast […] for months" and had to use a bank overdraft to survive. Overpayments, and the way claimants find out about their overpayments, cause extreme financial hardship by reducing claimants' income and not allowing them to be able to budget in advance. They also cause anxiety and stress for claimants, and their children in some cases. Ultimately making claimants feel victimised and stigmatised.

This part explains the intended aims of the TC system and the real-life consequences of claiming TC for one-third of claimants in the UK. Claimants find out about their overpayments too late, when HMRC has already calculated and made claimants accountable for paying back the overpayments. Claimants are unprepared and seldom are able to repay thousands of pounds back to HMRC and pay for food and electricity bills. So much so, some of them get into debt. The next part examines what claimants do after they find out about their overpayments, as an attempt to alleviate their suffering, by contacting HMRC workers to challenge their overpayments and get help and information about them.

Challenging tax credits overpayments: Getting help from HMRC workers

There are several causes of TC overpayments. These include claimant error, fraud and mid-year changes in income and/or household structure. As demonstrated above, some claimants do not expect nor understand what has caused their overpayments. Yet, HMRC have already made them accountable and responsible for paying them back by automatically reducing their future TC income, and in some cases, stopping their TC income altogether. Claimants have the right to challenge and appeal their overpayments by contacting HMRC. Due to government restructuring, underpinned by neoliberal political goals, several local tax offices were shut down in the UK (Closs-Davies et al., 2020), forcing many claimants to contact HMRC call centres (locale) by telephone instead of engaging in face-to-face conversations with HMRC workers (expertise). Thus, most claimants initially challenge their overpayments in remote faceless ways.

Most claimants interviewed for this research project were put on hold when trying to speak to HMRC workers on the telephone. Juliet (employed, divorcee) was put on hold for up to 50 minutes. This is "infuriating" for Sally (employed, married, two children) who ends up ending the call because she "couldn't get through" and her children were "jumping on the beds" and noisy. When Sally called HMRC and was put on hold again, she was told by an automated system to call back. When claimants want to challenge their overpayments, they are forced to deal with automated telephone systems and put on hold for long periods of time. Some claimants end up either ending the call, and do not get to speak to HMRC workers to question their overpayments.

Some claimants do get to speak to HMRC workers on the telephone. For instance, after waiting on the HMRC telephone helpline, Hannah eventually speaks to a HMRC worker. She is asked to provide her identification information, to include her date of birth and national insurance number, before being able to ask questions about her overpayment. The HMRC worker tells her to write a letter (inscription device) to HMRC because they are unable to help her on the telephone. This is because HMRC computer screens (inscription device) do not provide access to this information to HMRC workers (expertise). Juliet finds out about her overpayment by receiving an overpayment notice (inscription device) in the post. She phones HMRC to question her overpayment, but she is told that they cannot deal with her case and she is passed on to the debt recovery department. Juliet describes this experience:

> "They were passing it through to their progressive debt department, and quite quickly, for the recovery. They're quite persistent on the recovery […] Things have sometimes escalated quite quickly before you've got a chance to try and address it." (Juliet)

In Juliet's case, the HMRC worker could not help her and her case was passed on to the debt collecting department. She describes this experience as moving from "first stage" to "second stage". The latter she describes as a "more aggressive" worker. This makes it more difficult for Juliet to challenge her overpayment because they can only deal with enquiries that relate to how Juliet is to pay back the money. She is unable to get information about the cause of her overpayment to help her appeal against it.

Colin is an advocate and representative of a vulnerable claimant (unemployed, single, father of one child) for whom he helps challenge their overpayment. Colin sends letters to HMRC, rather than use the telephone helpline, and over a period of eighteen months, he receives letters from several different “groups”, “teams” and “floor” departments, in each case he has to deal with a different HMRC worker. Janet and Cain (employed/unemployed, married with two children) have had several experiences of being passed between different HMRC workers on the HMRC telephone helpline, they believe it is a strategy to by HMRC to “make things difficult for” and to put claimants “off” challenging their overpayments. As a result of being passed on by HMRC workers, claimants end up feeling disempowered.

When claimants engage with HMRC workers to challenge their overpayments, some do not get help or empathy from HMRC workers. Nadia speaks to a HMRC worker on the telephone to find out why her TC income has stopped (see also earlier about Nadia’s experience). The worker tells Nadia, “you’ve been claiming childcare when you haven’t been working” and this caused the overpayment. However, when Nadia tells the worker that their information is wrong and that she has been working, the worker accuses of her “lying” and believes that the information shown on HMRC records is correct. Nadia pleads to the worker, “please help me. I don’t understand”. But the worker repeats the same information. Nadia describes the worker as a “rude idiot” and felt they “weren’t listening” to her. Her encounter with the HMRC worker is “emotionally draining”. She “lost her temper” and “couldn’t be bothered doing anything” further. She stops challenging her overpayment.

Kara tells a HMRC worker “I haven’t got any money. My children will starve!”. But the worker continues to repeat the same information that she has an overpayment which must be repaid. Kara describes HMRC workers as reading from a “script” because “they say exactly the same thing all the time”. Several claimants share similar experiences to Nadia and Kara who feel HMRC workers do not listen to them, are unhelpful and do not show any empathy toward their desperate circumstances. Being put on hold, being passed on and dealing with unhelpful and unempathetic HMRC workers lead some claimants to stop challenging their overpayments, who end up repaying thousands of pounds back to HMRC. Ultimately worsening their financial hardship and reinforcing feelings of victimisation.

Such encounters with HMRC workers not only affected the claimants interviewed for this chapter, but were also experienced by other claimants across the UK. So much so, this prompted some claimants to create social media accounts as an outlet to vent their frustrations and as a space to help and support each other. For instance, some claimants created a Facebook group named, "Tax Credits Suck". The Facebook group captures the experiences of tax credits claimants across the United Kingdom and Northern Ireland from different demographics and social backgrounds. Figure 6.2 is an extract of a post that was written by a claimant and posted onto the Facebook group's webpage. Figure 6.2 illustrates the experiences of one claimant who suffers an overpayment of £10,000. Several other similar experiences are also shared on the Facebook group's webpage.

> Hi there. Thanks for accepting my request to join. Thankfully we are about to come off Tax Credits but I still need help from you guys and also possibly a warning as not sure if any of you have experienced this ..
>
> We have been trying to call them since Aug (Mission impossible) My payments stopped. Finally got through to somebody today 1 HOUR LATER!! They claim they stopped paying us in August and thats because this year they 'decided' to pay us over 4 months instead of over the full year. We had no notification of this at all but the lady we were speaking to said that they do this with (some) accounts - We asked if it was intact a system error and she said "Err I dunno" Obviously this has now started to put us in quite a bit of trouble financially.
>
> Also, they have sent us a bill for 10K!!!!! They have sent overpayments before but when we called and disputed they said over the telephone its their fault and to ignore it, next minute our case is with the Debt collectors.
>
> We cannot really live our lives like this - Its causing loads of stress but they don't record ANY notes and then deny telephone conversations - it really is appalling!

Figure 6.2. Extract from Tax Credits Suck, Facebook, 2015.

The stories examined in this part raise important questions about how the TC system is administered at the frontline. But also, how it is experienced by HMRC workers who deal with claimants who need help and financial support, and are often emotional and anxious on the telephone. The next part examines the experiences of HMRC workers during their encounters with claimants on the telephone.

HMRC workers' experiences of dealing with tax credits cases and claimants

The UK tax authority has undergone several restructuring projects over the past 40 years (Closs-Davies et al., 2020). These include the merging of Inland Revenue and Her Majesty's Customs and Excise in 2005 and the replacement of local tax offices with large regional offices and call centres (locales) thereafter. As a result, HMRC workers (expertise) were relocated from an office that was based in the community and consisted of a mixture of frontline staff, inspectors and managers, all of whom shared their knowledge, experiences and skills, to isolating same-level teams of workers far from the community (Closs-Davies et al., 2020). As part of the UK government's goal to restructure public services, tax administration became digitised. This meant that tax credits claimant information was inputted into an ICT system (centre of calculation), from which claimants' TC awards and any overpayments would be calculated.

Anna (HMRC worker) has worked for the tax authority since the early 1980s and has experienced the changing work practices in her office since then. When TC were introduced in 2003, Anna dealt with paper-based TC application forms, handwritten letters and paper evidence (inscription devices) provided by claimants. She was also able to meet claimants face-to-face in the local community tax office. These practices enabled Anna to assess "whether somebody's not totally being honest" by seeing the number of mistakes made on paper and the claimant's body language during a meeting. Claimants were able to articulate their circumstances in their own words to Anna. This also humanised her interactions with claimants because she was able to observe their emotions and any struggles. However, when Anna's office became "paperless" she had to deal with information provided to her on a computer screen (inscription device). TC awards/overpayment were calculated by the ICT system, instead of her. She had to communicate with claimants on the telephone, or by sending a letter in the post which was prepared and printed by the ICT system. This made it very difficult for Anna to believe claimants and she does "not feel comfortable" making decisions on a claimant's TC award case and telling claimants the outcome of her decisions. This is because claimants end up "shouting" at her on the telephone.

Other HMRC workers that were interviewed as part of this research project share similar experiences. Claire describes the ICT system as a "nightmare to use". Julie says "it was soul destroying […] and takes away any discretion" a HMRC worker wants to apply to a case. According to Julie the ICT system, "takes away any grey areas" of a case which means that claimants circumstances must fit into pre-determined criteria for it to be considered by the ICT system. Experienced HMRC workers were used to dealing with claimants/taxpayers through face-to-face meetings in their local tax office, or on the telephone when they "understood what was going on properly" in a case. However, due to digitisation and relocation from the community, HMRC workers found themselves having to deal with claimants remotely and through digitised means. Their discretions and decision-making were also taken away as claimant information was inputted into an ICT system which processed, calculated and presented the information to them on computer screens on a script.

According to Julie, HMRC tried to reduce the number of phone calls received from claimants, "because waiting times […] were pretty awful" and workers were not achieving their performance targets, by encouraging claimants to either write to HMRC or use their online services (ICT system). Some HMRC letters did not include the telephone help-line number (Julie). In David's case, he and his colleagues were monitored on how much time they spent on a case. He says, "the pressure was just to get it cleared". So much so, he "dreaded going in most days" and "didn't dare take any time off [work]". According to Claire, 90 percent of the post had to be dealt with within "28 days". Workers are also assessed on how much "yield" they produce, which according to Anna means "how much have you brought back [and] saved the business". Anna's colleague is congratulated by their line manager during a staff meeting after finding and charging a £15,000 overpayment onto a claimant. Anna says, "you've got to think of the people that you're hitting. They're people of society. This person [claimant] has now got a £15,000 overpayment and nobody seems to realise. It's not just a job [for us]; it's a life changer [for claimants]".

Anna, and her colleagues, are monitored and assessed on whether they achieve their performance targets on a daily basis, and their line managers are also monitored and assessed in similar ways as frontline staff. HMRC workers are awarded for finding and charging tax credits overpayments on claimants, quickly processing cases and telephone enquiries from claimants. HMRC workers are sanctioned if they do not achieve their performance targets, either by getting relocated to a different department, being re-trained, not getting promoted or at worst risk losing their job (Closs-Davies et al., 2020).

Discussion

The UK has seen a significant shift in UK political discourse, in particular under Margaret Thatcher's administration, from a "dependency on the state" to "self-dependency" (Peters, 2001). Self-responsibility is one of the key themes of neo-liberal governance (Peters, 2001). Drawing from this, the aims of the traditional welfare state of equality and fairness for all shifted to a targeting of individuals where individuals are subjected to automated, digitised and inhumane public services. Making users of those public services self-responsible for helping themselves and finding ways to navigate through government financial support programmes.

This chapter finds that the UK tax credits (TC) system is one such example that demonstrates the stark consequences of the restructuring of the tax authority, underpinned by neoliberal political ideology. Paper-based, handwritten application forms and letters (inscription device) were replaced by automated letters, notices and computer screens. Access to, and encounters with, HMRC workers (expertise) changed from face-to-face meetings to faceless conversations on the telephone. Locales changed from local-based tax office buildings to remote call centres. HMRC workers lost their ability to work out TC awards and overpayments and apply discretion and judgement toward claimant cases because centres of calculation, in terms of the processing of claimant information and making decisions and outcomes, was taken over by ICT. This transformation in TC administration makes it difficult for some claimants to challenge their TC overpayments, often disempowering claimants to pursue their disputes. As a result, claimants end up feeling victimised and stigmatised. In addition, this chapter also highlights how everyday frontline encounters between HMRC workers and claimants can have profound effects on claimants' outcomes. It shows that although the TC system was designed to alleviate financial hardship, in reality it worsens financial hardship for up to one-third of claimants.

This chapter forms part of a bigger research project which examines frontline encounters of UK TC administration by HMRC, with the aim to understand how TC administration affects the financial and existential hardship of claimants. The findings of this chapter suggest that tax credits claimants are forced to become self-responsible and accountable for TC overpayments. One of the key characteristics of neo-liberalism thinking is to force people to become self-responsible. We see aspects of this in the previous section, where claimants are forced to become less dependent on the state (HMRC workers) for help, advice and support, and have to find other ways for coping and dealing with TC overpayments, and thus their own welfare. This means that individuals have to invest their own capital (resources), or get into debt, to budget and make themselves financially better off, so that the state does not have to. Thus, welfare recipients, promoted by the neo-liberal model, are encouraged to become privatised objects, who are responsible for managing their own economic state.

However, this chapter illuminates that this neo-liberal model shows significant deficiencies when applied within the TC context. Some claimants fail to be successful at being 'privatised objects' and managing to improve their own economic state because they are structurally disadvantaged due to constraints caused by HMRC practices. As a result, they become permanent residents of the 'underclass' and remain poor and dependent on welfare. Although claimants try their best to challenge and understand their overpayments, they also become portrayed as citizens who do not conform towards socio-political discourse and become stigmatised. Thus, some claimants are unable to become successful at being self-responsible for their own financial hardship and become trapped on welfare and debt and the stigma associated with it.

Conclusion

This chapter examines what happens when claimants find out about overpayments, how they deal with their overpayments by engaging with HMRC workers, and the financial and non-financial effects of such encounters. It argues that some claimants are made financially worse off when they engage with HMRC workers and remote digitised technologies, underpinned by the neoliberal discourse of efficiency and performance, which lurk behind the everyday scenes described by our interviewees. One of the main aims of the tax credits (TC) system is to make low-income individuals and families financially better off. However, this chapter finds that, in reality, some tax credits claimants are made financially worse off: claimants struggle to pay for essential household bills, are forced to depend on Foodbanks and get into debt. For example, Nadia faced having to use the Foodbank to feed herself and her two children, Kara had to depend on a crisis loan and Clara and her two young children had to survive on beans-on-toast for months. Claimants who initially challenge their overpayments are made to feel inferior, disempowered and worthless as a result of their encounters with unhelpful and unempathetic HMRC workers and digitised technologies. Claimants lose their pride and suffer from anxiety, worry, stress and depression. Nadia lost her pride and suffered from depression because of the stress tax credits overpayments causes her. Caitlyn and Kara feel "worthless" and not part of society. Instead of making them financially better off, their engagement with the TC system reinforce the stigmatisation of claimants who get trapped in welfare poverty and inequality. This chapter finds that the administration of TC has become disembodied and dehumanised and that it fails to engage with 'real people' with 'real lives'. As a result, it sustains an asymmetry of accountability: claimants are forced to become self-responsible for dealing with and repaying tax credits overpayments.

This chapter highlights how the administration of welfare systems has less to do with representing basic human needs and protecting citizens by improving their economic conditions and social prosperity. Rather, it has more to do with governing, surveying and influencing the behaviour of public service workers and citizens. Drawing from this, the administration of welfare programmes thus becomes a pervasive form of relational power as it facilitates the judging of people and themselves and their transformation into self-responsible individuals, referred to by Foucault as 'governmentality'. The administration of welfare programmes transforms human beings (claimants and HMRC workers) from subjective emotional living beings, some of whom are in desperate need of help and support (claimants), to standardised abstract governable objects. As a result, this dehumanises the welfare system, where human needs and characteristics become of little use and value. This goes against the very definition of welfare, which strives to improve the wellbeing, good fortune, happiness and prosperity of citizens.

Looking back at this chapter's findings so far, this chapter broadens our understanding of the role of public administration and accounting technologies by determining and analysing the relational processes facilitated by accountability mechanisms, to explain the order and constitution of the social world. In this respect, it provides several important theoretical leads to further explore. First, we need to further explore how discourse is enacted and adapted in practice and with what consequences. There seems to be an intricate relationship between social stigma, the complexity and accountability of a TC system and claimants' self-worth. Second, we should look deeper into practices of knowledge/power inherent in everyday frontline encounters to transforming the lives of citizens and public services workers, and the role of digitisation which seems to lurk behind the scenes. How are understandings of deservingness, poverty, accountability for outcomes and acceptance of outcomes crafted through relational practices? This chapter calls for further additional study of systematically examining the nature, quality and real-world consequences of encounters between citizens and public service workers, and how this (re)creates and sustains socio-political discourse through every day relational practices.

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7 The Market-Based Approach and Taxable Presence Issues in the Digital Era

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Abstract

Taxable presence issues in the digital era have in part, lead to the consideration of a market-based approach to taxation. This chapter considers the extent to which this approach resolves taxable presence issues that are caused or exacerbated by digitalisation. In comparison to the Permanent Establishment rules, the market-based approach will have a remedying effect on some tax issues while giving rise to new issues and leaving some issues unresolved. Current rules are not robust at reflecting the presence of significant business activity in the digital era. Does the market-based approach tackle this inability to capture significant digital business activity?

The chapter challenges 'economic allegiance' justifications between market-based activities and market jurisdictions. The market-based approach is robust at indicating the presence of economic activity in the market jurisdiction, but, it does not match the role of market-based activity in proportion to the value chain as a whole. Thereby, the market-based approach to taxation risks exceeding the significance of market-based activities to the business as a whole. Within and beyond the market-based approach, taxable presence and corresponding tax rights allocation should acknowledge the role of the market-based activities in the value chain of the business as a whole. Market-based activities are key value creators for certain types of business models, but this is still not desirable if market-based tax policy leads to ring fencing such models.

The analysis in this chapter questions the need for a market-based approach in international tax if it does not substantially resolve the issues that reform started out with. Therefore, it concludes that the market-based approach should be reconsidered as a policy option if it is not sufficient in light of taxable presence issues and is not aligned with a holistic view of value creation.

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Introduction

The first section of this chapter notes key market-based factors, the interpretation of "market-based" and recognises how "market-based" is different from marketing intangibles. The second section explores the extent to which the market-based approach tackles taxable presence issues, namely, Scale without mass, Performance of business activities directly without the need for a local PE, Lack of a suitable proxy and Avoiding taxable presence for significant market-based transactions. The third section 3 considers whether market-based factors reflect core value creation activities of the business.

The analysis in this chapter questions the need for a market-based approach in international tax if it does not substantially resolve the issues that reform started out with. Yet, if the market-based approach does not materially tackle taxable presence issues and does not recognise the significance of the market-based activity in light of the business model, we will have to question again the purpose of rearranging or adding a market-based approach to the current tax framework, in light of other advantages or policy goals.

Therefore, the chapter concludes that the market-based approach should be reconsidered as a policy option if it is not sufficient in light of taxable presence issues and is not aligned with a holistic view of value creation.

The market-based approach

The following table compiles a non-exhaustive list of proposals that use market-based factors to recognise taxable presence and allocate taxable income. Market based factors are used across both long-term and short-term proposals:

1. OECD Pillar 1 (OECD, 2019a)
2. Marketing intangibles (OECD, 2019b)
3. Digital services tax (European Commission (E C), 2018a)
4. Significant digital presence (European Commission (E C), 2018b)
5. Withholding tax methods and equalisation levies[2]

2 For example, India, Hungary, Malaysia (KPMG, 2019).

Table 7.1: Proposals using market-based factors to recognise taxable presence and allocate taxable income

Market based factors suggested by the proposal	**Factors used for taxable presence or taxable income allocation**
OECD Pillar 1	
User/market jurisdictions - "market jurisdictions" "MNE group sells its products or services Provides services to users Solicits and collects data or content contributions from users" (OECD, 2020a)	Taxable presence is not compulsorily established before taxable income is allocated to the market jurisdiction (Amount A).
Marketing intangibles	
Beyond digital businesses: User and customer base Other marketing intangibles. It is not clear that these marketing intangibles are recognised in financial statements and what they specifically comprise of (EY, 2019; OECD, 2019c).	Taxable presence and taxable income allocation (for example, through formulary apportionment).
Digital services tax	
Advertising targeted at users of a digital interface Transmission of data collected about users (also from user activity on the interface) Intermediation services through a multi-sided digital interface (E C, 2018a)	Revenue from these activities become taxable in the absence of a taxable presence. Therefore, indirectly profit allocation or re-allocation takes place.
Significant digital presence	
Revenues from providing digital services to users, or number of users of a digital service, or number of business contracts for digital services (B2B) in a jurisdiction (E C, 2018b)	Taxable presence
Withholding tax methods and equalisation levies	
On payments made to a non-resident for: Digital advertising services Designing Creating Hosting or maintenance of websites Providing any facility or service for uploading, storing or distribution of digital content Online collection or processing of user data, E-commerce supplies of goods and services in the country (KPMG, 2019)	In the absence of a taxable presence. When viewed together with other corporate tax mechanisms, indirectly affects taxable income allocation across jurisdictions.

The factors used to ascertain taxable presence and allocate taxable income across the above examples are representative of market and output-oriented activities. While being emphasised in these proposals, the market-based activities are carved out of whole business activity. Such exclusive treatment is a significant shift in tax policy design.

Prior to these proposals, the PE rules, that are used to establish taxable presence in the source country, did not differentiate based on the type of business activity but considered the relative significance of the business activity. It is the *significance* of an activity to the business as a whole (OECD, 2020) which impacts the recognition of a taxable presence in the form of a permanent establishment, not the *type* of activity.

The current rules under OECD and UN Model Tax Conventions does not discriminate on the type (market/production/inputs), proximity of the activity to revenue, direct income generating nature of the activity or the participants of the transaction. The market-based proposals increasingly refer specifically to users and customers as participants for business transactions.

A common understanding of 'market-based'?

The market-based approach is not pre-defined and does not hold the same definitions across prior (Avi-Yonah, 2015; Devereux & de la Feria, 2014) and more recent proposals. The term includes jurisdictions where demand for a product is present, location of the customer and the destination approach (Barker, 2012). These three types of market-based factors are different but related.

For example, jurisdictions where digital users contribute user generated content for a product and view advertisements indicate jurisdictions where there is a demand for the product. Such activity is different from the location for an online purchase of a digital service or good. Again, both these activities are different from the location where the purchased good is finally consumed. The following figure clarifies the difference between jurisdictions of various market-based factors.

At the same time, monetisation also varies across market-based factors. For example, a social media platform business can have a strong user network in one jurisdiction, but they may not generate significant or proportionate income from that jurisdiction. The advertising revenue per user ratio (as per the table below) has been calculated for the month of December 2013, 2014 and 2015 from the Facebook 10 K report (Facebook, 2015a).

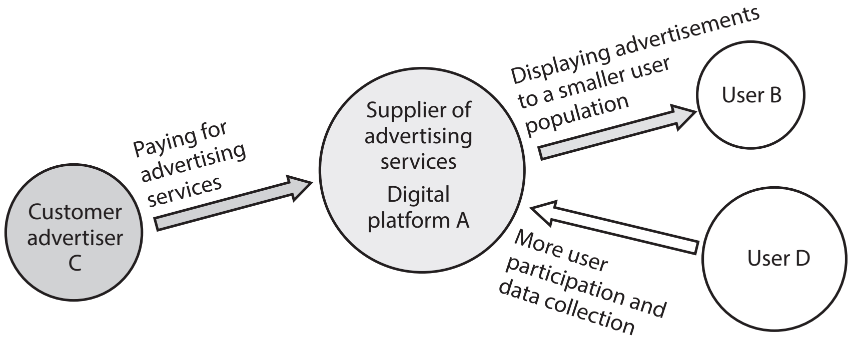

Figure 7.1: Difference between the jurisdiction of the customer and jurisdiction where the value creating activity is performed. *Author's own compilation.*

Table 7.2: Facebook data on advertising revenue

Daily active users in millions (December)	**2013** (p. 37)	**2014** (p. 33)	**2015** (p. 33)
US and Canada DAU	147	157	169
Europe DAU	195	217	240
Advertising revenue in millions (December)	**2013** (p. 41)	**2014** (p. 37)	**2015** (p. 37)
US and Canada	$1,068	$1,709	$2,811
Europe	$658	$960	$1,391
Advertising revenue per user ratio = Advertising revenue/Daily Active Users			
US and Canada	7.26	10.88	16.63
Europe	3.37	4.42	5.79

The report indicates that daily users are consistently higher in Europe than in the US and Canada. However, the revenue per user ratio is consistently lower in Europe. The analysis shows that the accounted income generated per jurisdiction is not always proportional to user population or digital presence within an economy (EY, 2017).

The point of contact between corporations and consumers/customers are common across market-based proposals however, the taxable presence and taxable income allocation results will vary depending on the market-based factors used in the proposals (Avi-Yonah, 2000; Devereux & de la Feria, 2014).

If the market-based approach is to conform with the current 'significance' approach, it should be assumed that these factors represent the significant engagement of the digitalised business in the economy of the jurisdiction and be core value creation activities for the digitalised business model as a whole. These would be far-reaching assumptions.

Marketing intangibles and market-based activities

The concept of 'marketing intangibles' (OECD, 2019c, p11) is often considered synonymous with or parallel to the market-based approach. The concept encompasses a wider scope of market facing activities as it aims to reflect the participation of the business in the market. It has a wider scope than the Digital Services Tax and market specific withholding taxes. The business will engage in marketing, advertising and other customer facing activities in the process of building this market and building the "positive attitude in the minds of customers" (Kibirige, 2019; Lowry, 2019) to lead up to a marketing intangible.

Marketing intangibles go beyond income generating market activities to the *potential* market. The marketing intangible may be built by the business for their own product. However, only a percentage of the marketing intangible would be monetised in one financial reporting period. The income arising from the market-based activity is a key differentiator between the marketing intangible and the location of the purchasing customer and destination factors. The monetised aspect should be relevant for taxation, not the potential market or market yet to be monetised. Market interactions of the business do not translate directly into income. Reform should therefore be careful in relying on the market interactions of the business to recognise nexus and taxable value.

Taxable presence issues in the digital era

The permanent establishment is considered to be insufficient and outdated for digitalised business activities. This section explores the effectiveness of the market-based approach in tackling taxable presence challenges (Olbert & Spengel, 2017). The analysis takes a targeted approach, conscious of the detailed composition of digitalisation tax issues, enabling a critical review of proposed policy reform. The following four issues are components of the taxable presence challenge, in light of digitalisation.

Scale without mass

This issue is exacerbated by digitalisation (Bundgaard & Kjaersgaad, 2020; OECD, 2018a, 2018b). Scale without mass is not a feature of business but a perspective towards understanding business operations in various jurisdictions. In this case, scale refers to business activity whereas mass refers to physical presence closely linked to the corresponding business activity, which is usually locally established. In many ways the 'mass' continues to exist in digital form.

The issue is that 'mass' in digitalised business models are not locally established close to the business activities in a jurisdiction, i.e., 'scale'. The network effects are not the digital version of mass. The main identificatory characteristic of mass in both digitalised and traditional businesses is the local presence enabling local business transactions.

Both scale and mass influence each other across the value chain. Business entities strategise the mass to meet scale targets and continue to adapt the mass to be efficient in proportion to the scale. Scale is a result of the efforts of the business in the value chain, reached through mass. Mass includes establishments, software developers, digital and managerial business infrastructure, offices and factories which are used to maintain and sustain the scale.

International tax policy has traditionally been based on 'mass'. The permanent establishment concept was initially focussed on physical presence which represents mass. This view has evolved over time to consider the significant character of business activity beyond direct physical presence (OECD, 2015a). Therefore, scale without mass results in issues for a policy that is based on 'mass'. The focus on mass has led to issues concerning commissionaire arrangements, fragmentation of activities and specific activity exemptions.

The distinction between scale and mass activities are beyond digitalisation. It is true that digitalisation renders the scale mass relationship more efficient, however, digitalisation is not the cause of the scale mass distinction. Why should business efficiencies in the scale mass relationship and the distinction between scale and mass be confronted by international tax policy, on the advent of digitalisation?

Market activity and the corresponding revenue is a result of preceding activities in the value chain that are not necessarily customer facing. Keeping taxation aside, if the value chain of the business is to be rewarded with income arising from market activity, large proportions of the income would be allocated to much deserving activities earlier in the chain. In other words, the background activities that occur earlier in the chain provide the material to take to the market.

Such earlier activities in the value chain were visible in the form of physical establishments, factories or offices that continue to exist in invisible digital form. An example is the skilled IT workforce who develop and manage the software essential to the digitalised business. Some of the earlier activities in the value chain may be covered by a 'routine' profit allocation (Devereux et al., 2019) for functions and activities that lead into market activity. However, the profit or loss reported in the financial statements are a result of routine and non-routine residual or market-based activities.

The design of the value chain is unique to each business. Cross prioritisation of market and non-market activity does not match the understanding of a business about their valuable and unimportant activities. Market activities hold varying proportions of investment and cost across value chains (OECD, 2015b). In fact, market activities are often less investment intensive, comprise of current costs and lower risk than development of technology, knowledge and competency management and product development.

The simplicity in recognising, validating and valuing market-based activity is administratively advantageous and easier than for non-market activities. However, market-based activities, particularly sales activities, have an evident value on their own, which is apart from but not independent of the mass. Whether this advantage should overpower the value that the tax system finds amongst non-market business activity should be reconsidered.

It cannot be assumed that market activity and associated routine or background activity should both be in the same jurisdiction of operation. The advantage and purpose of the multinational design for business operations would be extinguished by this assumption (Brynjolfsson et al., 2008). It is natural for scale to be without mass and mass to be without scale in either jurisdiction. The differentiation between scale and mass is not parallel with business strategy and will result in an uneven prioritisation of scale or mass across industries and also tax policy (OECD, 2020c, pp. 11, 23).

The market-based approach responds to the 'scale without mass' issue by focussing on scale instead of mass. Tax policy focussed on either scale or mass will be met with tax planning to artificially avoid the relevant scale or mass. The allocation of profits to both routine activities and market jurisdictions equitably can help avoid the problems from prioritising any one over the other.

A focus on business activity across scale or mass distinctions will help tax policy remain flexible towards each unique business model, without being influenced by the level of digital technology employed by the business to implement the relevant mass or scale.

Performance of business activities directly without the need for a local PE

Artificial segregation of income is different from the natural and acceptable absence of a permanent establishment. This issue is relatively new and largely introduced by digitalisation. Not every business activity leads to the recognition of a permanent establishment because every activity does not cross permanent establishment thresholds. In this section it is assumed that objectives of tax avoidance are not influencing the absence of a permanent establishment in a jurisdiction. Instead, this section considers business activities that naturally, do not form a permanent establishment on their own.

Concerning the delivery of services in the jurisdiction of the customer, the OECD 2017 update in particular (OECD, 2017a), states that the mere import of goods and services do not meet the requirements to form a permanent establishment and therefore a taxable presence in the jurisdiction of the customer. On the other hand, the UN had recognised the absence of standard mechanisms to tackle non-taxation of imported technical, consulting and digital services (UN, n.d.). Article 12A and proposed article 12B under the 2017 UN Model Tax Convention indicates a form of withholding tax that should not exceed an indicated percentage for 12A – technical services fees and 12B – automated digital services. Managerial, technical, consultancy services and services of a digital nature can become taxable to a limited extent in the jurisdiction of the customer who is consuming these services (UN, 2017). Such withholding taxes on service imports are crucially different from taxation as a permanent establishment after significance thresholds have been crossed.

Exported goods are an example of market-based activity which does not give rise to a permanent establishment for the foreign exporting business. Permanent establishments are not avoided but deemed unnecessary for certain market-based activities under current rules. The underlying guidance is that activity performed by a PE should be "essential and significant part of the activity of the enterprise as a whole" (OECD, 2017).

If exports are not eligible to be recognised as permanent establishments, why would remote sales or exports of digital goods become taxable under a dedicated market-based approach that directly captures sales activity? Despite digital goods being invisible, the rights of a consumer over a digital good are not the same but similar (Bradgate, 2010) to rights over a purchased tangible alternative. The difference in rights are not significant enough to justify the independent categorisation of digital sales. Therefore, the export of tangible goods can be viewed in parallel to the export of digital goods. In this case, market-based taxable presence would go beyond the tackling of base erosion to base acquisition of income which was previously not taxable under a PE. The design of market-based tax rights will influence the reach of tax reform over previously untaxed business activities.

Apart from sales, other remote activities that do not currently warrant a PE, including user participation and digital marketing, can be captured under the market-based approach. The market-based approach does not verify that these activities are essential and significant to the business as a whole. The market-based approach only verifies the digital, consumer facing aspect of such transactions.

If digital goods exports, which were previously not forming a taxable presence are performed together with other activities that are significant to the business as a whole, the place of business could form a single permanent establishment whereby the profits attributable will be for both preparatory and significant activities combined (OECD, 2017b). The combination of user participation, marketing and sales activities together are therefore capable of constituting taxable presence in the market jurisdiction.

It is not certain that the significant digital presence proposal (European Commission, 2018c; EU, 2018) and the OECD Pillar 1 consider each activity separately or in combination with other digital activities, in the market jurisdiction. In particular, the OECD proposal for a 'Unified Approach' under Pillar 1 identifies the mere sale of digital goods and services by Q Co. remotely to customers in Country 3 adequate to form a taxable presence. The proposed taxing right, Amount A, allows this in the case of 'sufficient sales' and allocation key (OECD, 2019a; 2020a). The standalone activity of digital goods export would not have formed a permanent establishment in the absence of marketing and distribution activities by Q Co. in Country 3 under current rules. Alternatively, the addition of sales to other significant marketing activities can be considered together to form a taxable presence under current PE rules.

Lack of a suitable proxy

The lack of a suitable proxy is relatively new and largely introduced by digitalisation. This issue is distinct from the above issues, and involves the lack of a visible, tangible or identifiable proxy for digital business activities taking place within a jurisdiction. This is a practical issue faced by tax administrations at the level of implementation.

The market-based approach across SDP, DST and Pillar 1, name and list activities to be used as a proxy to determine taxable presence. However, these proposals do not clarify how the identification of these activities will be enforced. Contracts between users and digital platform owners, viewing and engaging with advertisements, user participation, sales of digital goods and services cannot be isolated from the website which is hosting these activities 'as a whole'. Governments may order access to certain webpages to be restricted by Internet Service Providers but cannot isolate the performance of each one or other activity individually within a single website.

There are two ways in which digital business activity within a jurisdiction can be identified. First, as reported to the host jurisdiction by the international business themselves. Digital businesses will maintain access to information that helps them strategise business operations in a foreign market. Information used for this purpose includes user participation, advertisement eyeballs, user tastes and trends, sales values, advertisement to sales actualisation ratios and more (Google Ads Help, n.d.). Such information about digital activities will be reliable and used within the business to determine the nature and extent of participation, boost presence in the foreign market or to build presence in a new market. To the extent that the business uses this information for managerial decision-making purposes in the interest of profit generation, the information will be reliable and verifiable. Second, as reported by Internet Service Providers or cyber monitoring systems employed by the government.

Governments have the power to control activities on the network within the jurisdiction through Network Service Providers (NSPs) and Internet Service Providers (ISPs) (Shuler, 2002). Websites or applications can be banned, and ISPs can be ordered to block access within the jurisdiction to certain digital services. For example, Facebook and Twitter were blocked in China (Carsten, 2013). However, new technologies like high-altitude platforms and internet beaming satellites can affect government control over the networks. Tax regulation concerns arise as controls that were placed on local ISPs cannot be imposed as easily on a global ISP (Shuler, 2002) when network access is governed by a combination of international and local regulation. The technology would provide global network connectivity such that a single jurisdiction is not bearing all the costs of providing network infrastructure to the digital business. The blurred jurisdictional network boundaries would raise issues for the taxation of private global ISP businesses as well (Handwerk, 2013). The regulatory concerns are not far off as a batch of Starlink satellites beaming internet from space were launched in May 2019 (Amos, 2019; John, 2016). Further, this would weaken the relationship between the jurisdiction and the digital business on the grounds of the benefits provided by the jurisdiction.

Tax challenges would arise as users or digital customers cannot be associated with a jurisdiction when satellite internet connections allow the user to bypass traditional hierarchies of internet infrastructure (Shuler, 2002). A jurisdictional border is not enforceable on the network as access to the internet could be sold by the global satellite ISP directly to individuals in any jurisdiction (Floreani & Wood, 2005).

The use of cyber monitoring methods to determine the time and presence of a website within the local network would result in a costly exercise for governments. Furthermore, the reports indicating the participation of a software or webpage within a jurisdiction will need to be conducted across several small, medium and large enterprises. This information will then need to be analysed for all digital business activities before concluding about the eligibility or threshold to form a taxable presence. In addition to the acquisition and processing of such information, the human resource considerations will pose a challenge to tax administrations, particularly in developing jurisdictions.

In comparison to other activities, digital sales activities are easier to trace through online banking transaction reports. Funds used to purchase a digital good or service are presumably sourced from the local account of the customer that is likely to be linked to the earnings from employment within the jurisdiction (McKinsey & Company, 2018, p. 18). Hence it is possible to assign a jurisdictional identity to the financial resource, although the links between financial resources and the local jurisdiction would be difficult to validate when another globalised business is the customer. Increasing adoption of cryptocurrencies based on blockchain may further complicate the situation as they need not be affiliated with a jurisdiction. Another upcoming development that could potentially challenge the link between a transaction and the tax jurisdiction is the concept of Self-Sovereign Identity that is also based on blockchain technology. Self-Sovereign Identity could render a digitally extensive e-commerce transaction anonymous as the link between the customer and their banking or residence jurisdiction is secured from the public (Radocchia, 2019).

The lack of enforceable proxies is therefore not resolved by the market-based approach. Instead, the market-based approach only narrows the attention on proxies of a consumer facing nature. It is not certain how the thresholds for market-based activities can be enforced or identified across the vast network in today's globalised market.

Avoiding taxable presence for significant market-based transactions

This issue is exacerbated by digitalisation. First a taxable presence should be established before income is allocated for taxation. Market based activities are one of the easiest activities for which a PE can be avoided, such that even income reallocation mechanisms are ineffective. Examples of the issues explored here include, commissionaire arrangements, independent agents and fragmentation of activities. When planning to avoid tax, the challenge of PE recognition is not unique to digitalised business groups, however, it is more easily tackled with tax planning in digital groups than business groups who distribute physical goods.

The market-based approach certainly resolves issues where a permanent establishment *should have been* recognised. The issue here is not the lack of a proxy or uncertainty concerning the significance of an activity in the market jurisdiction. This issue assumes that the test for an activity to be 'essential and significant' in substance and value has been met for an identifiable activity, despite which a PE was not formed in the market jurisdiction.

A PE can be avoided in market and non-market jurisdictions by a combination of tax avoidance planning methods. In particular, the absence of a taxable presence in a market jurisdiction when *one should have been* recognised is an issue resolved by the market-based approach to a very large extent. The market-based approach is a positive tool to tackle this issue.

The advantage for the market-based approach is that it does not face the same limiting challenges faced by the PE rules in capturing significant digital market-based activities. Market-based taxable presence does not have the need to tackle the question of significance or fragmentation of market and non-market activities. All significant and insignificant market-based activities will be directly captured under the new approach and taxable income will not be distorted by considerations of significance. In many cases the market-based approach avoids ambiguities over the threshold requirements for a taxable presence. The ambiguity over being categorised as 'essential and significant' (to the business as a whole) in substance, is resolved with numerical revenue, user, sales or contract thresholds identified by many market-based proposals (as referred to in Table 7.1).

However, this advantage does not rule out the recognition of taxable presence in jurisdictions where market-based activity was significant as per the external threshold, but not significant to the business as a whole (internal). It is a misunderstanding that this issue is avoided by market-based proposals by way of revenue, user, contract and sales thresholds defined in currency (Khan, 2018). These thresholds will help ensure that smaller scale market business activity will not be burdened to comply with additional tax compliance requirements (European Commission, 2018d). The scale of one business will compete with the scale of another business under this mechanism. Previously, PE thresholds were not aimed at differentiating between big and small international business scales but between significant and preparatory/auxiliary activities across *both* big and small international businesses.

As the market-based approach will shift the focus onto scale size, businesses will be discriminated on the scale size in a jurisdiction. Big multinational businesses would face a market-based discriminatory playing field against medium and small businesses (Buzzell et al., 1975) for whom market-based activities might be significant to the 'business as a whole' but small in size (OECD, 2020a). Becoming taxable for being a big business is different from becoming taxable for doing big business.

The issue tackled by market-based taxation is the lack of proxies, but the new problem is that the proxies are not measured against internal but external thresholds. In contrast, under the traditional PE rules, keeping aside the lack of proxies, only 'essential and significant' market-based activities of the small, medium or large enterprise would be eligible to form a taxable presence.

The market-based approach is capable of capturing value created by market activities, however thresholds targeted at big multinationals are motivated by the anti-tax avoidance outlook of the market-based approach. Targeting of large-scale businesses is an appealing policy consideration for the aggressive tax avoidance culture amongst large multinationals. Tax avoidance methods are available also to medium sized multinationals. A long-term shift to market-based taxation may be responsive to this culture but is not a proactive strategy for reform. The tax avoidance response can come in the form of fragmentation, outsourcing and other strategies directed at staying below the defined type of market-based activities.

In comparison to medium sized enterprises, larger multinationals may find that market-based activity holds a lower proportion of value in the value chain. Larger businesses engage in other activities that can hold a higher proportional value in the value chain. Some examples of such activities are product innovation, development and maintenance of technological intangible assets and acquiring of new intangible assets through mergers.

The proportional contribution and value of market-based activities will vary not only across value chains but also across jurisdictions. Digitalisation trends for business processes vary amongst developed and developing jurisdictions. Expansion of network infrastructure offers improved network connectivity which allows digital businesses to access larger markets. As this empowers a previously less connected segment of the population, the divergence between the digital user and digital customer (purchasing) population would initially be increased (BCG, 2018; ET Bureau, 2018). For example, emerging markets' user populations are in the process of building up to the maturity of digital advertising markets in developed economies such as United States, Canada and Europe (Facebook, 2015b, p. 36). This divergence would subsequently affect justification of tax rights and the taxable income allocated to a jurisdiction when tax policy is based on market-based factors like user numbers or customer populations. Figure 7.1 is an example of this relationship where each circle represents different market-based interactions for the sale of the service, service delivery and collection of digital raw materials.

Market-based factors and core value creation activities for business

The market-based approach does not match the role of the market-based activity in proportion to the value chain as a whole. Market based activities are only one part of the value chain for the digitalised business. We earlier explored examples of market-based activities and how market-based activities are not all directly income generating. This section considers whether the market-based factor reflects core value creation activities of a taxable business.

Assuming that the market-based approach tackles taxable presence issues to a large extent, why would the anomalous use of market-based factors be justified as a new taxing right in addition to (OECD, 2020a) or as a replacement of the current permanent establishment rules?

The current permanent establishment rules may be weak but have a wide scope to recognise a range of activities that are significant to the business as a whole in the 21st century. The PE rules do not limit or prioritise business models for which market-based factors represent significant value creating activities. Whereas, the market-based approach assumes that market-based activities are significant to every business in the 21st century. It is true for digitalised business models that rely on users and user data, but not for other digitalised business models and certainly not for all business models in every industry.

Market-based activities hold different proportions of value creation across business models and industries. The proportion of value created by market-based activities in digitalised businesses are different from that of market-based activities in pharmaceutical, retail or extractive industries. Marketing is only one of the market-based activities (Govindarajan et al., 2019; Moorman, 2017; Socolar, 2015, p. 7). Therefore, the recognition of the *significance* of a market-based activity for a business can vary across business models but the market-based approach does not consider this variation when recognising a taxable presence (cf. to Porters Five Forces). Both specific and wide-ranging market-based approaches would thereby overlook the contributory participation of market facing activities within the value chain (Alvarez et al., 2018; Moorman, 2017; Roche, n.d.). The PE rules are more comprehensive at tackling the limitation in scope and assumption of significance brought by market-based proposals; however, they continue to face problems in the digital era as discussed earlier.

As an example, costs can be used to understand the significance of an activity in proportion to the costs incurred across the value chain as a whole. The following table shows the proportion of marketing and selling expenses in comparison to revenues across four business groups.

The expenses incurred by the business for marketing and market-based activities vary across businesses within the same industry and across industry types. This table establishes that quantitative significance will vary on the basis of a cost to revenue ratio.

Further, the qualitative significance of the activity to the business as a whole will also vary across industries and business models. Where does the business model use their core competency? Digital platform models use their core competency for market facing activities. Alternatively, other business models use their core competencies for production-based, raw material-based or labour-force based activities. Despite this variance, the market-based proposals uphold market-based activities in special regard.

Table 7.3: Proportion of marketing and selling expenses in comparison to revenues across four business groups

Business	Marketing and selling cost to revenue ratios for 2018 (Alphabet Inc, 2018, p. 47; Facebook, 2018, p. 59; Fiat Chrysler, 2018, p. 50; LVMH, 2018, p.22)*
Fiat Chrysler Automobiles	7%
Alphabet Inc.	12%
Facebook	14%
Moët Hennessy Louis Vuitton	38%

* Facebook, 2018, p. 42 – "Our cost of revenue consists primarily of expenses associated with the delivery and distribution of our products. These include expenses related to the operation of our data centers, such as facility and server equipment depreciation, salaries, benefits, and share-based compensation for employees on our operations teams, and energy and bandwidth costs. Cost of revenue also includes costs associated with partner arrangements, including traffic acquisition and content acquisition costs, credit card and other transaction fees related to processing customer transactions, and cost of consumer hardware device inventory sold." Whereas, "marketing and sales" includes "Our marketing and sales expenses consist of salaries, share-based compensation, and benefits for our employees engaged in sales, sales support, marketing, business development, and customer service functions. Our marketing and sales expenses also include marketing and promotional expenditures, and professional services such as content reviewers."

Jurisdictional benefits consumption, market-based activities and significance

Benefits consumption, significance considerations and market-based activities are three different elements of a transaction that is considered for taxation. For example, let us consider an exporter of music CDs, which are now digital in form. The benefits consumption in the customer jurisdiction, through exports, is minimal in comparison to the jurisdictional benefits consumed in the jurisdiction where the music is recorded, edited and produced.[3]

In terms of significance, qualitatively and quantitatively the production of the music is more significant. Qualitatively, the process of selling and marketing is not the core competency of the music producing business. Quantitatively, the marketing and selling/exporting involves the additional expenses incurred and resources consumed to achieve revenue. Without the marketing and selling expenses the product would not reach the final consumer, would stay in stock and would not translate to revenue income for the business.

3 Research and development, production and IT skilled labour are examples of background activities that are the least market facing/consumer facing.

The market-based activity in this transaction is the sale, export and consumption of the music CD. The recording, production and editing of the music is not a market-based activity.

The current rules establishing a taxable presence are most concerned with the second element – significance to the business as a whole (OECD, 2017b). Whereas the market-based approach overtakes this consideration on the grounds of the third consideration, *type*, the market or non-market type of the activity. The market-based approach does not match the role of the market-based activity in proportion to the value chain as a whole in cases where the market-based activity is not associated with the core competency and mission of the business. This is where a key difference should be highlighted. The terms economic allegiance, source of income and digital market presence are different and are not synonymous.

Economic allegiance is the concept which links the business entity to the jurisdiction. Economic allegiance embodies the relationship between the business and the jurisdiction (Avi-Yonah, 2005). Benefits consumption and significance of the activity to the business as a whole is relevant here, not the market or non-market type of the activity. Permanent establishments are a representation of economic allegiance relationships.

Whereas, the source of income and digital market presence are concepts linked with the market-based activity. Source of income (Kane, 2015) in this paper covers jurisdictions that are the direct source of revenue income (sales). For example, for a customer who pays to advertise on a platform, the market jurisdiction will be the source of income for the sales income, i.e., location of the customer. Digital market presence includes jurisdictions that are a source of revenue income and a source of market for their product, leading to revenue income, for example, marketing to acquire potential customers and user networks on a platform. Digital market presence is related to marketing intangibles, where only a portion of marketing intangibles are monetised or can be monetised immediately.

Therefore, the market-based proposal does not check the economic allegiance of a business with the market jurisdiction and instead directly recognises a taxable presence and/or taxable income allocation on the basis of income source or market-based activities.

The market-based approach to taxation risks granting a taxable presence to market-based activities that consume low benefits and are less significant to the business as a whole.

Technologies like 3D printing (McCue, 2018) raise questions as to what extent the software vendor is linked to the customer jurisdiction. The customers own the printer and materials locally but buy software and designs online from the taxable digital vendor. Employees and intangible assets are not necessarily based within the jurisdiction where the digital service or product is consumed (Heeks & Nicholson, 2002). In such cases, when customers of a service become the focus of benefits consumption within a jurisdiction, how can economic allegiance between the tax paying business and the jurisdiction be established for the market-based activity?

The absence of observable ‘mass’ for digitalised business models is not sufficient to justify a significant shift of tax rights to the market jurisdiction, leaving behind core aspects of economic allegiance when seeking taxable presence.[4]

Electricity can be viewed akin to coal or water in a 19th century factory, without which a digital good cannot be produced, delivered or consumed. Although electricity is a jurisdictionally insulated resource, the user or customer exercises control over the consumption of electricity. Therefore, the market-based approach correctly and directly identifies these digital market-based activities, however, it does not justify the economic allegiance between the business and the market-jurisdiction.

Under the benefit of the regulatory environment, an online sale would be illegal if the vendor does not have a business permit allowing them to sell online to a customer within the jurisdiction (Wolters Kluwer, 2018). Does the mere availability of a regulatory business environment contribute sufficiently to establish taxable presence or tax rights in a jurisdiction? The challenge in estimating the contribution of a good regulatory environment arises as the investment climate maintained within a jurisdiction is less relevant for a digital business unlike

4 Situations where market-based activities and other non-market activities take place within the same jurisdiction is not considered here. Performing these activities under a single PE or under different PEs will be relevant to force of attraction rules. Digital market-based activities are in most cases the only links between the jurisdiction and the international digital business group.

traditional businesses as transactions are not reliant on locally managed investments (World Bank, 2005, p. 97).

Both digital goods and services sold to customers in the source jurisdiction will be directly captured under the market-based jurisdiction. However, the market-based approach may not be justified in the above scenarios. Such direct capture of market-based activities will bejustified to the extent that the sales are making use of the permissive regulatory environment of the customer jurisdiction.

This analysis does not suggest that market-based activities are insignificant or do not deserve tax rights. The analysis instead clarifies that the significance of market-based activities to the business as a whole should be considered and that tax rights allocated in light of market-based activities should be proportional to their role within the value chain. Physical presence (Escribano, 2019) is not the distinguishing factor here for the recognition of economic allegiance.

Taxable presence can be built on economic allegiance, market state of source or market presence. We still have time to make this choice.

If taxable presence is to be built on economic allegiance, the significance of the market activities and benefits consumed by these activities in proportion to the business as a whole become relevant. The perspective of the business and the value of the activity to the whole value chain is influential here. Whereas, the location of the market activities and sales revenue income alone become relevant for a market presence built on source of income concepts.

The term 'significant' digital presence should not be confused with the concept of economic allegiance.

For example, the EU 'significant' digital presence proposal is mainly built on the source of income not economic allegiance. The indicators used by the EU 'significant' digital presence proposal (European Commission, 2018b) do not consider the significance of revenues, users and contracts in proportion to the value chain and business as a whole. The proposal considers what is significant against an external threshold across member states and not internal thresholds to the global business value chain as a whole. The perspective of the business is hardly considered here (OECD, 2020s).

An introspective consideration of significance can bring the proposal closer to economic allegiance. It is not enough for the economic relationship to be big, but the economic relationship should *matter* to the business as a whole. The focus on member states alone limits this consideration.

The market source of income together with market-based activities will limit the relevant taxable presence to the output delivery and revenue receiving/collecting type of activities. Such a group of activities can be split from the value chain as a whole and outsourced (Devereux et al., 2019). Martal Group and EBQ are examples of businesses who perform outsourced marketing and sales activities for digital and digitalised business models (EBQ, n.d.; Martal Group, n.d.). The issue highlighted here is not that these activities can be split from the business but that the market-based approach ring-fences a category of activities on the basis of their type and what the activity achieves on its own. The market-based activities have an objective of their own, independent of the business, that is to reach users and customers.

Further, the market-based approach does not clarify the treatment of a globalised customer. For example, a B2B cloud service can be delivered remotely over the internet and be accessed by any employee of the business customer across the globe. The purchase may be limited to one location whereas the consumption takes place across various jurisdictions through a digital network, internally on the network of the customer or externally on the network of the provider.

To summarise the analysis in this section, the PE rules have a wider scope than market-based factors to recognise significant value creating activities. Market-based taxation does not have a strong consideration of significance to reflect value creation that is 'core' alone. The market-based factors can recognise a taxable presence for core and non-core market-based activities. From this perspective, the issue is not that current rules to establish taxable presence have a poor scope, but that these rules lack a proxy to recognise the taxable presence. Meanwhile, the market-based approach changes the scope under which to recognise the taxable presence.

Conclusion

The 'new' taxation of activities that previously did not form a taxable presence should be reconsidered with caution. This chapter explores two key questions:

1. To what extent does the market-based approach tackle taxable presence issues?
2. And, are market-based factors reflecting core value creation activities of the business?

The analysis for Question 1 is summarised below in Table 7.4.

Tax reform should be careful at the addition of market-based approaches to recognise taxable presence. The market-based approach risks an unparalleled recognition of 'market type' business activities without checking their significance to the business as a whole. Current rules may be outdated, however, powerful principles and concepts underlying taxable presence should not be left behind by new proposals in the race to reform. The relationship between jurisdictional benefits consumption, economic allegiance, source of income, significance and market-based activities are explored under the last section of this chapter.

Further, such ring-fencing of market-based activities can lead to a ring fencing of digital and traditional business models that rely on market-based activities to create value. Both digital goods and services imports should be subject to the same tax treatments as tangible goods and remote services imported by residents of a jurisdiction.

Should the tax systems recognise that market-based activities are default core value creating activities for businesses, across industries and business models in the 21st century?

Users and customers of the digital business are more reliable proxies related to a jurisdiction when compared to other elements of a transaction. However, whether the international tax system would like to continue to reinstate longstanding concepts like economic allegiance or focus merely on the *presence* of business activities in a jurisdiction by using a market-based approach is the new question.

Table 7.4: Summary of analysis

Element of the taxable presence issue	Introduced or exacerbated by digital businesses?	To what extent does the market-based approach resolve this issue?
Scale without mass	Exacerbated, scale mass distinction is not driven by the use of digital technology	Responds by focussing on scale instead of mass. Recognising, validating and valuing market-based activity is administratively advantageous and easier than for non-market activities.
Performance of business activities directly without the need for a local PE (this issue is different from the artificial segregation of income from market-based activity).	Relatively new and largely introduced by digitalisation	The 'new' taxation of activities that previously did not form a taxable presence should be re-considered with caution. The performance of business activities directly without the need for a local PE should not now be caught by the net of the market-based approach. The change in corporate tax status (the recognition of a taxable presence) for exports of digital goods are not justified by the need to tackle corporate tax avoidance.
Lack of a suitable proxy	Relatively new and largely introduced by digitalisation	The lack of enforceable proxies is not resolved by the market-based approach. Instead, the market-based approach only narrows the attention onto proxies of a consumer facing nature. It is not certain how the thresholds for market-based activities can be enforced or identified across the vast network in today's globalised market.
Avoiding taxable presence for significant market-based transactions	This issue is exacerbated by digitalisation and not largely introduced by digitalisation	The market-based approach is proactive against tax avoidance strategies in market jurisdictions, except that it is capable of including market-based activities that may not be significant to the business as a whole. The proportional contribution and value of market-based activities will vary not only across value chains but also across jurisdictions.

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8 Principles-based Tax Drafting and Friends: On rules, standards, fictions and legal principles[1]

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Abstract

Tax complexity is a multi-faceted and pervasive phenomenon. Narrow, detailed drafting of the law is a particular manifestation of tax complexity. Tax systems have become dense thickets of often thorny rules – at the expense of transparency, certainty and equality. Principles-based legislation is sometimes proposed as an alternative regulatory instrument to counter both the complexity of detailed tax drafting and tax avoidance. In this chapter we will elaborate on principles-based legislation, rule-based drafting and two other drafting styles – legal fictions and standards. This is done from the perspective of (legal) principles as advocated by the legal philosopher Dworkin. These fundamental legal principles constitute a normative framework for legislation. None of these drafting styles should be seen as a magic formula. Securing the integrity of tax law requires the legislature to balance these different legislative drafting styles. In practice, the legislature will have to aim for an optimal mix of these styles.

Introduction

Tax complexity is a multi-faceted and pervasive phenomenon. Narrow, detailed drafting of the law is a particular manifestation of tax complexity. Precise, detailed rules are thought to secure legal certainty and equality for citizens. However, nowadays tax legislatures often try to control and regulate every conceivable situation (partly to prevent tax avoidance) by issuing very specific rules covering the

1 This chapter is a sequel to Dusarduijn & Gribnau (2018). The authors wish to thank the participants for their comments. The authors are especially grateful to Justin Dabner, Judith Freedman and Adrian Sawyer who commented on a previous draft of this chapter.

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full range of circumstances. Consequently, the tax system is populated by dense thickets of often thorny rules. This has become increasingly problematic: voluminous catalogues packed with detailed tax rules lack transparency and go at the expense of certainty and equality.

Principles-based legislation is sometimes termed as an alternative regulatory instrument to counter both the complexity of detailed tax drafting and tax avoidance. We aim for a realistic approach: principles-based legislation should not be seen as a magic formula but rather as a helpful addition to the legislature's toolbox.

In this chapter we will elaborate on principles-based legislation, rule-based drafting and two other drafting styles – legal fictions and standards. This chapter will investigate the meaning of these three 'friends' as alternatives, or supplements, to precise rules from the perspective of (legal) principles as advocated by the legal philosopher Dworkin. These fundamental legal principles constitute a normative framework for legislation.

It will be argued that securing the integrity of tax law requires a balancing act between different legislative drafting styles such as fictions, standards and principles-based legislation. In practice, the legislature will have to aim for an optimal mix of these styles.

Tax complexity, detailed rules and other drafting styles

Tax complexity is a pervasive phenomenon. Several powerful causes are playing a part. Some are inherent in tax law. Complexity arises for example from trying "to fit rules of law around the natural facts of economic life" (Prebble, 1994, p. 390). Before giving a very brief overview of the causes of tax complexity it therefore is important to note that it would be naïve to think that the tax systems can get rid of complexity. A realistic approach to complexity would rather require "to identify unnecessary complexity as opposed to complexity necessary to ensure the tax system is reasonably fair, efficient and certain" (Budak et al., 2016, p. 3). Subsequently, tax complexity should be reduced, wherever possible aiming for consistency with other objectives (Freedman, 2015).[3]

3 Where this reduction cannot be achieved, "there should be mechanisms to help taxpayers and revenue authorities to navigate around the remaining intricacies".

An important cause of tax complexity is that today's society itself is complex. The tax legislature strives for tax laws that do justice to this complex world and therefore moves along with all kinds of social, economic, and technical developments, such as individualisation, globalisation, digitisation and computerisation. Moreover, there are developments in international and European law to which the tax legislature must respond. Legislation is constantly refined and supplemented, with exceptions and deviations often added in the legislative process itself, partly to avoid undesirable side effects of proposed regulations (de Cogan, 2020, p. 107).[4] Additionally, the complexity of tax law is increased by measures to prevent unintended use and avoidance. Instrumentalism, the use of tax legislation as a full-blown regulatory instrument to steer taxpayers' behaviour, is another major cause of complexity (Gribnau, 2015). Taxes are also an important instrument of income and wealth policy. Furthermore, tax complexity arises from the need for fairness in taxation (distributive justice). Thus, tax systems are often driven by multiple policy objectives "many of which may not be jointly compatible" (Tran Nam, 2016, p. 13). More generally, Freedman argues that it "is elementary that a fundamental cause of tax complexity lies in flawed underlying policy" (Freedman, 2015, p. 255).

Avery Jones, referring to the findings of two UK reports, sums up some several other causes of tax complexity reflecting "our whole legal culture" (Avery Jones, 1996, pp. 64-65).[5] To our minds most of these causes go beyond a UK perspective: the common law approach (Krever, 2008, p. 191).[6] The need for legislation to prevent avoidance, the courts, (Krever, 2008, p. 192)[7] political tinkering, the parliamentary process,

4 In the event tax legislation fails to produce the desired outcome, it is often corrected "by increasing the level of statutory detail or by supplementing the basic rules of taxation with anti-avoidance techniques".

5 Following Atiyah & Summers (1987), he points at England's tradition of narrow, detailed drafting as opposed to the American tradition.

6 Krever (2008), for example, points at the inherent uncertainty of key concepts in tax legislation caused by the misapplication of the doctrine of precedent. This is due to the "the propensity of Anglo judges (apart from US judges)" to use "transplanted categories" when interpreting tax legislation rather than interpreting these concepts in light of the objectives of tax laws. "However, any coincidence of the purpose of the transplanted concept in its original application and the purpose of the concept in tax law is just that—pure coincidence".

7 An important phenomenon is the inclination of many Anglo judges (again, other than US judges) to construe taxation laws narrowly, "resolving ambiguity in favour of the taxpayer and significantly, favouring form over substance" (Krever, 2008, p. 192).

parliamentary counsel, the lack of time, tax reform, the increasingly global and sophisticated business environment and changes in general legal framework are also present in civil law. Last but not least, Avery Jones points at "the increasing desire for tax law to be detailed and precise so that it is certain in its application". This desire results in ever more narrow and detailed drafted tax rules. This tendency may also be due to the absence of 'principles' or 'general rules', as Krever says: "There is little evidence of the simple principles of an income tax in the legislation. To the contrary, the current construction almost seems designed to obscure principles" (Krever, 2008, p. 192). Absent general principles or rules established by the legislature to guide the interpretation and application of the rules everything has to be spelled out in rules which will inevitably have indeterminate borders generating new complexities – to be resolved with new rules.

Narrow, detailed drafting of the law is a particular manifestation of tax complexity. Rules are almost sacred in tax law – for rules are thought to secure legal certainty (and equality) for citizens. However, a rule-based mindset may result in a massive catalogue of rules with a high level of particularity and detail because of the inherent logic of ever greater specificity. This has become increasingly problematic because of its adverse impact on transparency, certainty and equality.

Moreover, comprehensive narrow and detailed legislation is vulnerable to tax avoidance: one can play by the rules but can also bend the rules. This is a well-known reality in tax. Counteracting tax avoidance is one of tax authorities' major concerns nowadays. Preventing this unintended use or even abuse of the tax law induces complex corrective legislative measures. Principles-based legislation is sometimes presented as an alternative regulatory instrument to counter both the complexity of detailed tax drafting and aggressive tax planning. It is seen as a remedy for the failures of narrow, detailed drafting of tax legislation. It has been argued that there is need of "a robust understanding of the differences between rule and principles" in order to achieve clarity on the relevance that "the rules or principles debate has for assessing the relative complexity or simplicity of a tax system" (Freedman, 2010, p. 717; Oats & Morris, 2015, p. 29). This chapter aims to contribute to such robust understanding. However, there are more instruments in the legislature's toolkit for creating less detailed rules.

Principles-based drafting is but one of them. In this chapter we will deal with two other drafting styles – legal fictions and standards – before turning to principles-based drafting.

This chapter will investigate the meaning of these three instruments from the perspective of (legal) principles as advocated by the legal philosopher Dworkin. Fundamental legal principles embody the dimension of morality (justice, fairness) in law (Dusarduijn & Gribnau, 2020).[8] They are regulative ideals that make morally sound positive law possible. They constitute a normative framework for legislation: legislation should be aimed at realising these principles.

Lawmakers should therefore respect normative legal principles since they constitute the 'internal morality of law'. Legislation should therefore not violate, for example, the principle of equality or legal certainty. However, often different and diverging principles are at stake. For example, the integrity of tax law requires on the one hand counteracting tax avoidance by establishing a system of robust rules. On the other hand, a price may be paid, for example in terms of a breach of the principle of legal certainty. Thus, securing the integrity of tax law requires a balancing act when choosing between different legislative drafting styles such as fictions, standards and principles-based drafting (Cooper, 1996, p. 582; Elliott, 1997).[9] In practice, the legislature will make use of mix of these styles.

This chapter will thus put the idea of principles-based drafting in a broader context, focusing on the question: how to evaluate the three drafting styles from the perspective of normative principles. This question will be answered by first setting out the Dworkinian idea of normative principles which will be connected to the concept of the 'internal morality of law'. Next, the conception of tax law as a system of detailed rules will be dealt with by analysing the importance and main features of

8 In this chapter, we do not distinguish between general legal principles and more specific tax principles such as the ability to pay principle (income tax) and the neutrality principle (value added tax).

9 Rewriting tax law in plain 'English'– thus using less arcane language, allowing the law to be more easily comprehended by the general public – is often also presented as an instrument to reduce complexity in law. However, rewriting tax legislation in a clearer or simpler style will not cure the complexity, for a complex system of rules will remain a complex system even when it is clearly expressed. However important it may be for legislative drafters to avoid incomprehensible legal language, for the purpose of this chapter drafting in plain English (promoting readability) is not a drafting *style*.

rules. Rules, however, have their drawbacks. A rule-focus often results in a self-perpetuating spiral of ever greater specificity and detail. This level of detail entails a lack of transparency. Another shortcoming of these narrow, detailed rules is their vulnerability to a legalistic and formalistic approach resulting in mismatches between the general nature of the rule and the goal the rule serves (the underlying justification). This tax avoidance goes at the expense of the principle of equality (distributive justice). The legislature may use different instruments to prevent unnecessary detailed rules and/or counter tax avoidance: fictions, standards and/or principles-based legislation. Their main features will be brought to light and they will be evaluated from the perspective of normative principles. We will finish with a brief conclusion.

Values and principles in taxation

According to the legal philosopher Dworkin, the ideal of integrity in law requires a commitment to a coherent set of principles, "the promise that law will be chosen, changed and developed and interpreted in an overall principled way" (Dworkin, 1986, pp. 300-301). Examples of these fundamental (legal) principles are equality, legal certainty, proportionality and fundamental rights. The ability to pay principle and the principle of neutrality are examples of important tax specific principles. This also goes for tax law, which therefore should meet the requirement of principled consistency (Dworkin, 2006, p. 90ff; McCaffery, 1996, p. 107).[10] Unfortunately, it does not, for both legal principles and non-legal principles are often seriously neglected. No wonder, trust in the integrity of the tax system, governments and multinationals is under pressure. This illustrates the foundational nature of tax.

Dworkinian principles

A conceptual question is what kind of principles we are talking about when discussing principles-based drafting. As will be discussed later, principles-based drafting is based on the concept of a principle as an operative rule stating an object or purpose. Translating in this way intended outcomes into 'principled rules' seems rather confusing to legal scholars acquainted with Dworkin's distinction between princi-

10 Dworkin (2006), where he applies two principles of human dignity, the principle of the "intrinsic value of human life" and the principle of "personal responsibility", to tax policy.

ples and rules – two logically different kinds of standards.[11] On the one hand lawyers use rules, on the other hand "standards that do not function as rules but operate differently as principles, policies and other sets of standards" (Dworkin, 1977, p, 22; Gribnau, 2014). Before elaborating on the difference between principles and rules, Dworkin distinguishes principles and policies – though he also uses the term 'principle' generically. He then defines a principle as a standard which is to be observed because it is "a requirement of justice or fairness or some other dimension of morality". A policy is that kind of standard that "sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community". The most striking difference is that, other than policies, Dworkinian principles express moral requirements. Thus, principles in the narrow sense embody the dimension of (internal) morality which, according to Dworkin is part and parcel of the law (Bingham, 2010, p. 8).[12]

The notion of 'internal morality of law' refers to the qualities legal rules must possess according to Lon Fuller in order to be recognisable as law at all (Fuller, 1977; Ratnapala, 2013). The very concept of law carries with it certain moral qualities. These are set out in his famous eight desiderata: there should be general legal rules, these rules should be reasonably clear and non-contradictory, duly promulgated, have prospective effect, it should be possible for the citizen to comply with the law, rules should not change too frequently and there should be congruence between the rules as announced and the acts of the administration (Fuller, 1977, pp. 46-91).

Internal morality: a coherent scheme of normative principles

Trevor Allan argues there is considerable scope for refining the formal archetype of the rule of law. A satisfactory account of the rule of law must be more complex and demanding than a formal one. To his mind, the principle of the rule of law can be fully understood only in connec-

11 Dworkin uses standards in a broad sense, to our minds they could also be called "norms" (prescribing what ought or ought not to happen).

12 Principles can be more or less general covering a larger or small part of the law. Thus, the rule of law may itself been seen as a higher-level principle. Cf. p. 8: "The core of the existing [constitutional] principle [of the rule of law] is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally in the future and publicly administered in the courts."

tion with a certain view of the related ideals of equal dignity and worth of persons and individual liberty. The rule of law thus is not just a shield against the abuse of law since formal equality becomes a more substantive ideal of equal citizenship. In this more substantive conception of the rule of law, law provides the conditions in which each individual's liberty understood as independence can be safeguarded. This moral ideal of governance according to law enforces a scheme of rights and duties preserving "the sovereignty of individual choice and action by allowing each person to pursue his own purposes, free from domination either by state officials or overbearing fellow citizens" (Allan, 2016, p, 205).

Liberty is thus enhanced when the rules enacted reflect a coherent scheme of principles. "The development and application of legal principles serve to give unity to the legal order, providing a shared moral foundation for the ascertainment of people's rights and duties–the legal rules being illuminated by their reasoned application in particular cases" (Allan, 2016, p. 207). Allan refers to Dworkin's principle of 'integrity' which displaces conflicting views about justice by the requirement of adherence to a single, coherent, and comprehensive set of principles of political morality, treating all alike according to those principles. These legal principles may best be seen as internal standards generated and developed by the legal system itself – although they are strongly influenced by (external) morality.

The moral nature of tax and the substantive conception of the rule of law make the role of principles in tax law all the more important. Principles in tax law are regulative ideals that are intimately connected to society's moral values, and society's views on the integrity of the tax system (Gribnau, 2014, pp. 203-206). Since (fundamental) legal principles embody the internal morality of tax law, the task of lawmakers is to secure that the tax system conforms to legal principles. This requires time and is again a balancing act since principles may collide.

Dworkin next distinguishes principles in the generic sense from rules. Principles differ from rules in a number of ways (Goodin, 1982, pp. 60-63; Weber, 1978, p. 109).[13] First, he argues that the difference between

13 Some critics argue that the rule-principle distinction can be largely collapsed. To our minds, principles and rules are both to be seen as ideal types, which, as Weber explains, are used, partly for "heuristic" purposes, partly for "classificatory" because there are large number of events in empirical reality which conform to it with a greater or lesser degree of "purity".

the two kinds of standards is a "logical distinction", for they differ in the character of the direction they give with regard to legal decisions. Rules are applicable in an "all-or-nothing fashion". If the conditions provided in the rule are met, the legal outcome follows automatically. Legal principles do not operate this way. They state a reason which argues in a certain direction but does not compel a particular decision. Legal consequences do not follow automatically, for there may be other principles (or policies) arguing in another direction. Unlike rules, principles are therefore not directly applicable, they are not operative rules.

This first difference entails another. Other than rules, principles have a "dimension of weight or importance" (Dworkin, 1977, p. 26) This implies that when principles (or policies) collide, their relative weight has to resolve the collision. Fundamental (normative) legal principles carry serious weight, but here there is no such thing as absolute weight. Their exact weight has to be established in concrete situations (hard cases) where other principles may be at play. The principle of legal certainty never offers absolute certainty. The balancing of principles is context dependent. With regard to the rules, however, it does not make sense to ask how important or how weighty they are. Rules are "functionally important or unimportant", i.e., within the system of rules. So, the conflict between two rules cannot be resolved by establishing which rule supersedes the other because of its greater weight. The decision as to which rule is valid in case of a conflict between rules, "must be made by appealing to considerations beyond the rules themselves" (Dworkin, 1977, p. 27). With the difference between these two key elements of a legal system, principles and rules, being explained, we will now elaborate on rules.

Tax law as a system of rules

The foregoing defence of the relevance of principles notwithstanding, the rule of law is often seen as "the rule of rules" (Alexander & Sherwin, 2001). But why have rules? And what are the main features of rules? Members of a society often have different views about their (moral) rights and obligations. People's behaviour is motivated by their beliefs about what is the right thing to do. They may disagree over concrete courses of behaviour (the right way to behave) as well as about factual matters. The ensuing problem of coordination requires a mechanism to settle these disagreements authoritatively. Some kind of authority thus provides a settlement as to what ought to be done and members of society must consult the terms of this authoritative settlement. This means that these terms "must supplant the reasons upon which they are based" (Alexander & Sherwin, 2001, p. 13). Thus, according to Alexander and Sherwin, authoritative settlement solves the problems of coordination (caused by uncertainty on how others will choose to behave), expertise (reducing errors stemming from individual decision-making) and efficiency (reducing decision-making costs) (Alexander & Sherwin, 2001, pp. 14-15). Rules are necessary for authoritative settlement. Thus, rules are justified as time-saving devices and as devices to reduce the risk of error in deciding what ought to be done (Raz, 1990, p. 59; cf. Mill, 1843).

Clearly, we are not dealing with rules of thumb, which are useful guides but do not, even when accepted, furnish reasons for action in themselves, but with mandatory rules. Mandatory rules, when accepted, provide reasons for action "simply by virtue of their existence *qua* rules, and thus generate normative pressure even in those cases in which the justifications (rationales) underlying the rules indicate the contrary result" (Schauer, 1991, p. 5). In the legal system, these mandatory rules are issued by a legal authority. The function of this legislative drafter is "to convert legislative policy into legislative shape" (Thornton, 1997, p. 149).

The legislature has different drafting styles to choose from. In this chapter we focus on narrow, detailed rules and three alternative styles characterised by a lower level of detail. Ignoring the many nuances of these techniques, detailed drafting can be pictured as a type of legislation with a high level of particularity as its rules are intended to cover as many conceivable eventualities as possible and these rules are to be interpreted literally. In contrast, a principles-based approach of the legislature tends to state general principles rather than attempt to deal with every possibility explicitly. Hence the level of detail is low. The same goes for drafting styles using standards and fictions.

In many countries tax legislation, which defines the rights and obligations of individuals and companies in relation to the state, is grounded in narrow, detailed rules ('black letter law'). This drafting style is primarily rule-based, featuring precise and highly detailed rules to cover a whole range of possibilities rather than a simple statement of policy. The rationale seems to be that taxation requires legislative drafters to spell out in great detail what is intended, rather than rely on 'fuzzy law', that is, law based on general principles (James et al., 1998, p. 39).[14] However, increasingly detailed tax legislation has quite a few drawbacks. It is incomprehensible except for a few specialists and lacks durability. Moreover, incomprehensible tax legislation compromises fairness, consistency, and coherence (see *Comprehensive detailed tax legislation: riding dead horses?*, on p. 177). Thus, there is an urgent need for another drafting style. In this section the current rule-based approach and its level of detail will first be analysed.

Rules

What actually is this thing called 'rule'? A rule can be defined as "a general norm mandating or guiding conduct or action in a given type of situation" (Twining & Miers, 2010, p. 80). A key characteristic of (legal) rules is that they are future-oriented, they are forward-looking. They attempt to specify outcomes before particular cases arise (Sunstein, 1996, p. 21). A detailed and precise rule better specifies outcomes than a rule formulated in broad terms. When formulating a rule, the past may be instructive. Rules are often based on solutions and answers to particular controversies and questions that came up in the past, while trying to resolve foreseeable disputes. They are "more general than the controversies and questions already resolved and thus anticipate and resolve controversies and questions that have not yet arisen" (Alexander & Sherwin, 2001, p. 18).

Rules, be they descriptive or prescriptive, are general rather than particular (like a single observation or command). Generalisation is inherent to rules. Rules describe a regularity or uniformity among multiple instances or prescribe for a multiplicity of actions. Thus, rules are necessarily general, the result of a process of generalisation. Rules as such can, of course, differ with regard to the level of generality or particularity of a prescription or description, but even detailed rules with a high level of particularity are based on a generalisation. Generalisation entails the selection and inclusion of certain properties of particulars (persons, actions, things, words) and exclusion of other properties. Pre-

14 'Black letter' law is intended to cover as many conceivable eventualities as possible and to be interpreted literally. In contrast, 'fuzzy law' tends to state general principles rather than attempt to deal with every possibility explicitly.'

scriptive rules prescribe for all of some category. They are concerned with "ought (not), may (not) or can (not), in relation to behaviour" (Twining & Miers, 2010, p. 81) Indeed, rules are often made in response to a particular occurrence or to future expected events or behaviour. The goal to be achieved or the evil sought to be avoided (in case of proscription) constitutes the justification of the rule (Schauer, 1991, p. 27).

Legislation consists of rules which are general prescriptions. General and abstract rules promote certainty and equality, but there also is a drawback. These generalisations encompass a set of facts which stand in a relationship of probabilistic causation to the justification, i.e., this set of facts is probabilistically related to the likelihood or incidence of the justification. A rule such as "no vehicles in the park" does not contain vague norms or standards, but it predicts, so to say, that cars in a park are a nuisance. As often true as this may be, this does not go for an ambulance which enters the park to transport casualties to a hospital. Consequently, fewer or more cases fall under the rule than its aim justifies. Rules can sometimes yield outcomes other than those that would be indicated by direct application of the rationale or justification lying behind the generalisation (Schauer, 1991, p. 32).[15] Applying a rule, therefore, will sometime or other lead to mismatches between the general nature of the rule and the goal which this rule serves, which is the underlying justification. This under- or over-inclusiveness is an inevitable phenomenon (Schauer, 1991, pp. 78-79).[16] Over- and under-inclusiveness might be repaired by the tax administration or the judiciary to give the taxpayer certainty with regard to the actual application of the law.

Rules are a key feature of modern legal systems (Fuller, 1997, p. 47).[17] There is no reason, however, for an excessive reliance on rules. A legal

15 Schauer (1991, p. 32): "The generalization of the rule's factual predicate is over-inclusive if it encompasses states of affairs that might in particular instances not produce the consequence representing the rule's justification, even though the state of affairs, as a type, is probabilistically related to likelihood or incidence of the justification. The factual predicate is under-inclusive if it occasionally fails to indicate the justification in cases in which is present."

16 This is in contradistinction with "particularistic decision-making" which focuses on the particular situation, case, or act, and thereby comprehends everything about the particular decision-prompting event that is relevant to the decision made (Schauer, 1991, pp. 78-79).

17 According to Fuller (1977, p. 47), the first desideratum of a legal system is "there must be rules of some kind, however fair or unfair they may be".

system of rules featuring a pervasive level of particularity and detail is a vice rather than a virtue. Tax scholars are keenly aware of the need of a balanced approach to rules. Indeed, it is sometimes observed that some countries seem to suffer from a disease called 'tax rule madness' (Vann, 1995, p. 193).[18] Fortunately, there is a cure available: "what we need is less detailed legislation construed in accordance with principles, not a continuation of the plague of tax rule madness". In the next section we will diagnose the symptoms of this tax rule addiction and in the subsequent sections we have a look at other cures available in the tax legislature's pillbox.

Comprehensive detailed tax legislation: riding dead horses?

Modern regulatory states guide society and economy. The tax system is used to correct 'market failures' and market outcomes in terms of income and wealth which are deemed not to be fair and acceptable. Governments also take on responsibility for societal well-being such as health, education and environmental protection. They do so by steering behaviour by issuing specific commands backed by the force of law, but also by implementing tax regimes which for example reflect the social costs that a harmful activity imposes on society or incentive. Taxation is used to produce various social, political, and economic consequences (Bogart, 2003, p. 114). It is viewed as a cure all device and subsequently tax law (further) evolves into a highly technical language.

Thus, the urge to guide and steer complex society is an important driver of the proliferation of ever more detailed rules. Legislatures are continuously creating and changing existing and refining existing rules in response to all kinds of societal, economic and cultural developments. Of course, legislatures can let things run their course. However, society seems to expect government to provide a solution to all kinds of issues, and legislatures want to be responsive to societal needs. Legislation reflects a society that has become obsessed with the search for precision to deal with every contingency. The allure of rules is clear: legislatures assume to be in perfect control of things with a comprehensive system of clearly defined and detailed rules (Lacey, 1992, p. 362).[19]

18 "We suffer from tax rule madness, a disease that affects the advanced Anglo-Saxon countries generally with Australia having a particularly virulent form".

19 Legislative strategies are embedded in cultural and historical frameworks. With regard to those of Britain and the United States, Lacey argues that Dicey's legacy produced a

With regard to tax legislation, the principle of legality, providing legal certainty (and equality), can be seen as a matter of major concern since it is the basis for the tax administration's unilateral determination of taxpayers' obligations. The principle of legal certainty is indeed a fundamental legal principle, which carries serious weight, especially in tax law – as for example Advocate General Poiares Maduro maintains (Cases C-2555/02 et al., 2005). This principle requires that the application of legislation "must be foreseeable by those subject to it" (Cases 70/83, et al., 1984). That requirement of legal certainty must be observed even more strictly in the case of rules entailing financial consequences, so that those concerned may know precisely the extent of their rights and obligations (Cases 325/85 et al., 1987, para. 17). The principle of legality guaranteeing certainty and equality thus seem to require a high level of particularity and precision. Detailed and precise tax legislation will be certain in its application, or so it seems. Thus, a statute becomes a catalogue of rules.

Ruling out every eventual contingency also goes for legislative responses to taxpayers using the rules in ways not intended by the legislature, or even abusing the rules, since this impairs equality and a level playing field. Such roads should be blocked, gaps have to be closed with new, more specific, that is detailed rules. Yet with greater specificity and detail there is an increased chance that something will be left unaccounted for. The rule-based mindset however leaves no room for hesitation or doubt about the solution: more specificity and detail – making the law more voluminous and complicated. The spiral seems self-perpetuating. "Even a conceptually simple change may only be achievable by means of a complex provision - because the new legislation has to fit into the conceptual framework and language of the existing body of law" (IFS, 1994, para. 3.15; cited in Avery Jones, 1996, p. 69).

An important, and perhaps the most important, driver of the legislature's rule-based mindset is the lack of trust in the courts. The legislative rule focus thus reflects a 'command-and-control' approach to the determination of law – a far cry from seeing the courts as (junior) partners in the business of in law making (Barak, 2006, p. 17). The legislature does not trust the judges to give effect to the ideas behind the tax rules.

stereotypical "lawyer's view" of the world. "Problems are typically seen as arising from ambiguities or 'gaps' in the rules, calling for clearer interpretation or further legislative or quasi-legislative action".

Surely, this high level of specificity and its accompanying volume of layers of detailed rules and complexity have a drawback. “Detail and certainty do not necessarily go together” (Avery Jones, 1996, p. 69).[20] Legal uncertainty arises when taxpayers faced with a thicket of detailed rules do not fully understand their rights and obligations, such as tax liabilities (Ulph, 2015, p. 48).[21] Since the rule of law aims to make the exercise of government power predictable, enabling citizens to plan their affairs their activities with foreknowledge of its potential legal implications, there is a point where lengthy and detailed legislation begins to undermine the rule of law (Freedman, 2015, p. 254).

Indeed, the prevailing focus on drafting narrow, detailed rules has become increasingly problematic. Tax law lacking transparency goes at the expense of certainty and equality. Citizens find it hard to cope with voluminous catalogues packed with detailed tax rules which lack transparency for all but highly specialised tax professionals (Diver, 1983, p. 67).[22] These specialists can be expected “to charge special fees, thereby bidding up compliance costs” (Young, 1997). Taxpayers who are clever and knowledgeable or can hire clever and knowledgeable tax advisers are favoured. Moreover, the tax administration also has to deal with this complexity and become highly specialised, otherwise enforcement difficulties will follow, which will increase the costs of collection and increase taxpayers’ dependency on tax administration’s advice (Daly, 2020). Young succinctly summarises the disadvantages of drafting style focused on narrow, detailed rules. “Once the law reaches a certain level of complexity and incomprehensibility, fairness, consistency, and coherence are compromised rather than enhanced” (Young, 1997, p. 176). He subsequently makes the point that tax laws which are understood by neither lawmakers nor taxpayers can hardly be seen as promoting democracy and accountability.

20 Avery Jones (1996, p. 64) cites IFS’s Tax Law Review Committee interim report on tax legislation (1995) para. 3.21 “The possible permutations of facts are virtually infinite so that legislation cannot possibly aspire to answer every question. In this sense complete immediate certainty is unattainable.”

21 He subsequently points out that various groups of taxpayers are differently affected by tax complexity.

22 Diver (1983) seems to term this ‘accessibility’ that is, a rule is “applicable to concrete situations without excessive difficulty or effort” rather than ‘transparency’ which results from the use of “words with well-defined and universally accepted meanings within the relevant community.”

Tax laws seem to be detailed by nature. However, in our dynamic world rules are inadequate by nature as additional amendments have to be made "when ordinary factual variations have not been considered by the drafters, if more modern developments that arguably fall within the same general policy parameters or when 'the list' to deal with loopholes devised by taxpayers and their advisers needs to be expanded" (Smith, 1997). Detailed rules thus can quickly become obsolete and the resulting frequent changes to counter this risk makes it harder for taxpayers to gear their activities to the law. This lack of durability (stability) goes at the expense of legal certainty. The accumulation of these refinements, adjustments and additions to the details have resulted in a complex legal system which is no longer clear nor accessible for taxpayers. This often-excessive complexity might even hinder economic activity, creating burdens for individuals, businesses and communities. As Heaton even concludes "It obstructs good government. It undermines the rule of law" (Heaton, 2013).

Complexity in tax law leads to a number of undesirable consequences such as uncertainty for business and personal taxpayers and inflated costs of administration and compliance. A lack of knowledge and understanding of the (highly complex) system of tax rules may be a serious impediment to compliance, resulting in "unintentional non-compliance" and "(un)intentional overcompliance" (McKerchar, 2001, p. 267; McKerchar, 2007, p. 192). Both go at the expense of equality because not all taxpayers are paying their due amount. Moreover, complex tax rules may reduce the willingness of taxpayers to comply voluntarily with the requirements of the tax system (Kayis-Kumar et al., 2020; Kirchler, 2007, pp. 12-13). It will also increase administrative and compliance costs and make useful discussion of tax policy more difficult (James et al., 1998, p. 32). Although the complexity of a tax system refers to several different issues, in the trade-off between rule-based and principles-based drafting the predictability of the legislation catches the eye. A rule would be simple if that rule and its scope are easily and accurately understood by taxpayers and their advisers whenever necessary (Cooper, 1993, pp. 103-110).[23] This simplicity however is rare in tax legislation.

23 The other issues being proportionality, consistency, compliance, administration, co-ordination and (clear) expression.

Rule-focus breeds a calculating mindset

The rule of law requires the tax rules established by the legislature to be firmly embedded in fundamental (normative) legal principles. Moreover, moral principles such as distributive justice should be respected. Well-tailored rules promote legal certainty and equality, but in practice the tax legislature is inclined to continuously refine the system of rules, for example by introducing exceptions and exceptions to exceptions. This is partly caused by the use of taxation as a regulatory instrument imposed to control, penalise, or encourage, behaviour (Pagan, 1993, p. 90).[24] The widespread use of tax incentives is one of the major reasons for the ever-growing complexity of the tax system. Complexity goes at the expense of predictability, but consistency in time, another element of legal certainty, is also seriously lacking because of the all too frequent changes made by the legislature (Steinmo, 2003, p. 218).

Thus, legal certainty is seriously eroded, resulting in lower levels of compliance (sometimes uncertainty is even deliberately created to put off taxpayers). Furthermore, important values such as consistency and transparency are treated in a step-motherly way. The prevailing political view on taxation as a regulatory tool, to realise all kind of policy goals, increases the risk of the introduction of "tax privileges" – to the prejudice of the integrity of the tax system. Moreover, many taxpayers do not have the expertise to deal with tax complexity so they may not be capable of using tax incentives they are entitled to, which adversely impacts equality. Tax complexity may also negatively impact taxpayers' perception of the distributive justice and fairness of the existing tax system (Gribnau, 2015, pp. 233-234).[25] Tax legislation thus regularly violates important legal values and principles, such as legal certainty, equality, neutrality and consistency.

Indeed, the tax legislature would do well to show more respect for legal principles. Legislatures issuing these kinds of unprincipled rules show disdain for important legal and societal values and do not command respect. Eroding the internal morality of the law may chip away

24 This regulatory or instrumentalist use of tax legislation violates the first commandment ("do only what is absolutely necessary") and third commandment ("respect the basic principles of the existing system") for new tax legislation as defined by Pagan (1993).

25 Also, the adoption of a calculating attitude is stimulated in which rules are seen as opportunities to pay less tax. An ethical attitude, which sees paying tax as contributing to the sustainment of society in a fair way shared by all, is crowded out.

at tax legislature's legitimacy and may produce taxpayers' decreasing compliance (Kirchler, 2007, p. 39).[26]

Tax rules thus become ever more complex – adversely impacting legal principles like equality and certainty. Unfortunately, complexity and tax avoidance go hand in hand; some expert taxpayers will play with the rules to their advantage (Braithwaite, 2002, p. 58).[27] In an international context, differences between tax systems exacerbate tax planning opportunities. Multinational corporations, for example, exploit "areas where several tax systems must interact and the scope for tax arbitrage, playing the rules of one system off against another, is considerable" (Shaw et al., 2010, p. 1151).

Sophisticated taxpayers can turn around the rules to their advantage (Gribnau & Dusarduijn, 2018, pp. 9-11). These taxpayers and their professional advisers exploit the formal characteristics of law.[28] According to McBarnet and Whelan (1991, p. 849) "the combination of specific rules and an emphasis on legal form and literalism can be used artificially, in a manipulative way to circumvent or undermine the purpose of regulation" (see also Weisbach, 1999). The formality of tax law, as Prebble and Prebble (2010, p. 45) argue, "is an essential prerequisite for contriving artificial transactions that enable the creators of the transactions or their clients to avoid tax" (see also Filipczyk, 2017). Thus, the fundamental legal certainty is undermined and therewith the value of the rule of law. These taxpayers shift their tax burden (partially) to others at the expense of the principles of reciprocity and equality (Gribnau, 2017; Wheatcroft, 1955, p. 213).

The tax legislature usually reacts with remedial legislation, that is, refined or new rules, adding to the existing complexity of tax law. This excessively detailed and extensive legislation seems however to be a dead end. As Braithwaite (2005, p. 147) argues, comprehensive tax legislation designed to preclude avoidance opportunities results in exces-

26 Empirical research has found that continuous changes and complexity in tax law have a negative effect on the level of compliance (Kirchler, 2007, p. 39).

27 Wealthy taxpayers may opt for game-playing with rules by exploiting change and complexity. New products never conceived by the law may be created. Braithwaite argues that for multinational corporations this kind of financial engineering is "a newer modality of a more longstanding tradition of contriving complexity in their books, organizational complexity and jurisdictional complexity".

28 Epithets for this attitude could be 'legalistic', 'literal' and 'formalistic' (Twining & Miers, 2010, p. 115).

sive complexity. Thus a "smorgasbord of rules engenders a cat-and-mouse legal drafting culture – of loophole closing and reopening by creative compliance". Schemes exploiting existing rules are marketed as opportunities while counteracting measures will take a number of years. The same goes for specific anti-avoidance rules: the drafters cannot cover in advance all possible transactions and it takes time to adapt to unforeseen taxpayer behaviour. Again, also these rules will inevitably be sidestepped (Dabner, 2003). Moreover, excessive length and complexity may be seen as "the result of a loss of and disregard for the art and discipline of tax legislation" (Pagan, 1993, p. 90). So, the question is: should we give up our faith in detailed rules altogether?

Enlarging the toolbox of the legislature

As seen, detailed rules lead to complex legislation. Rules are an important feature of a fair and efficient tax system, but nowadays in many countries a rule-based mindset leads to a self-perpetuating spiral of ever greater specificity and detail. Some countries even suffer from this disease called 'tax rules madness'. To counteract the complexity caused by detailed rules and the taxpayers' opportunistic playing with the tax rules, the legislature may employ several instruments. We will now deal with three alternative drafting styles, all aiming at reducing the level of detailed tax legislation: fictions, standards and principles-based legislation. Each of them will be evaluated from the perspective of normative (Dworkinian) principles.

Fictions

Fictions, legal assumptions created by the legislature, are often used to increase simplicity in the implementation of tax legislation. The rental income of owner-occupied housing is a well-known example of a fictitious tax base grounded in simplicity. These legal fictions in taxation presuppose, for example, that someone enjoys a given income in a given period although he does not actually receive that income or, in any event, does not do so to that extent or at that time.[29] Nonetheless,

29 These pragmatic legal fictions in taxation generally take the form of a fixed rate levy applicable to similar or closely related situations and circumstances. The fiction thus is intended to approximate as closely as possible to the empirical reality of taxpayers but is still a generalisation that only by pure coincidence corresponds with the reality of an individual.

he is taxed on the basis of his fictitious income, as if he actually receives that income. Thus, legal fictions disregard certain details of taxpayers' empirical (economic) reality in order to promote the efficient implementation of tax law or to prevent abuse of the law. The presence of a legal fiction in tax law might even increase the legal certainty of a taxpayer. After all, the robustness of this provision allows taxpayers to calculate their tax liability and to predict the tax administration's behaviour. Although legal certainty is enhanced; however, at the detriment of the equality and the ability to pay principle (Dusarduijn, 2015). The use of fictions in tax legislation leads to a system of 'rough' and robust rules that may well provide taxpayers with legal certainty but may not sufficiently discriminate between differences in taxpayers' ability to pay and therefore impinge upon distributive justice.

On the other hand, a legal system with refined, detailed rules might also constitute an infringement on distributive justice as its clear, precise and predictable rules can be complied with creatively. Anti-abuse fictions in taxation, such as exit taxes, usually take the form of an 'as if' that expands the scope of a legal norm. By bringing certain facts and circumstances within the scope of what has proved to be an unduly narrow legal norm, an anti-abuse fiction can enable the norm to take better account of what taxpayers' experience as the empirical reality in economic terms. This category of legal fictions in taxation is often used in cross-border situations. For example, the emigrating owner of a substantial interest in a company that is established in the Netherlands will be taxed on the basis of a fictitious disposal of this interest.[30] This legal fiction in the Dutch Personal Income Tax Act is employed to prevent tax avoidance with regard to the realised increase in value of this substantial interest during his stay in the Netherlands. The desire to avoid loss of tax claims has also led to numerous legal fictions in the Dutch Corporate Income Tax Act. An example can be found in art. 8b, first paragraph of the Dutch Corporate Income Tax Act 1969. This rule states that if conditions are agreed between related entities which differ from conditions that would have been agreed by independent parties, the profit of these entities will be determined as if the last-mentioned condi-

30 See art. 4.16, para. 1, section h (fictitious alienation), Personal Income Tax Act 2001. As a consequence of this fictitious disposal the assumed profit from this substantial interest is added to the income in Box 2.

tions were agreed.[31] The purpose of this legal fiction is to avoid non (at) arm's length profit transfers between affiliated companies affecting the calculation of the taxable profit.

Thus, the use of legal fictions in tax law can be seen as a two-sided remedy for problems caused by detailed rules. While the pragmatic legal fictions occur when flaws start to show in tax law implementation, the anti-abuse fiction focuses on the ordinary rules of tax law when the application of 'ordinary' rules do not meet their underlying justification anymore. Both types of legal fictions fall within the scope of our definition of rules as their words reflect general norms mandating or guiding conduct of action for a given situation.

This definition of a legal fiction as a deliberate and purposive departure from the ordinary legal reality implies that the 'as if' of each legal fiction creates a separate legal reality. It is essential to distinguish between these two dimensions of legal reality – the real and the fictitious – since we cannot otherwise appreciate that legal fictions in taxation are at odds with Dworkinian principles such as the equality principle. After all, the lack of detail in a fiction treats unequal situations unjustified as though they were equal. By departing from the ordinary legal reality in taxation, legal fictions clash with the principle of equality – one of the principles that forms the core values of our taxation system.

The justification for any conflict with these principles of law is connected with the presumed right of existence of legal fictions in income tax, the type of conflict also correlates with this motive. To be able to analyse the acceptability of 'as if' in a legal sense, it is necessary to distinguish why the tax legislature creates this deliberate and intentional departure from ordinary legal reality. Whereas pragmatic legal fictions might be seen as a deliberate departure from not only the legal system itself but from its underlying principles as well, an anti-abuse fiction can be seen as a return to these principles, a U-turn to the spirit of the law without explicitly using a principle-based approach. Although its aim is to repair a situation, this form of 'as if' can conflict with the principle of good faith under treaty law, especially where the legislature

31 The adjustment of the profit that results from this is often not seen as fictional profit. However, there are also arguments for another view. If you do not see the profit shift as a shame that must also be ignored by civil law, then there is a fictitious profit compared with the profit under civil law.

wrongly uses this national legal fiction to arrogate to itself rights of taxation. Moreover, the implementation of this fiction in cross-border situations may expose an individual taxpayer to double taxation owing to the concurrence of a fictitious and a real tax on income in two different States.[32] Besides that, the use of legal fictions of this kind should always be restricted to the identified abuse. It should therefore be possible to assess whether an anti-abuse fiction is properly applied in each case or to adduce evidence to the contrary.

It follows from the above that the use of legal fictions in taxation – the content of which is determined by the legislature – not only shows advantages but has also clear disadvantages.[33] The special nature of legal fictions in tax requires that they are employed only with due caution. Their presence may, after all, be a source of tension with the requirements for a just system of taxation. The legislature therefore should carefully balance the fundamental legal principles at stake.

Standards

Tax systems seem to become ever more complex and refined with highly detailed rules. Fictions, legal assumptions leading to rough and robust rules, are an exception to this development. Legislatures can also use other tools in order to avoid excessive complexity. As Weisbach (1999, p. 860) points out, in response to taxpayers' manipulation of the rules, "lawmakers and regulators have shifted the tax system toward standards, primarily by adopting what are known as anti-abuse rules". A typical anti-abuse rule allows the government (and only the government) to override the literal words of a statute or regulation. Instead, the government may require a 'reasonable' tax result if the taxpayer enters into or structures a transaction "with a principal purpose of reducing tax liabilities in a manner contrary to the purposes of the statute or regulation, even if the transaction otherwise literally complies with the rules".[34]

32 Moreover, this type of legal fiction might lead to a shift in the rights to levy tax under treaty law and can therefor conflict with the principle of good faith under treaty law (Vienna Convention on the Law of Treaties), especially where the legislator wrongly uses this national legal fiction to arrogate to itself rights of taxation.

33 The presence of a legal fiction in income tax has also been found to influence the extent to which taxation is regarded as fair. As perceived fairness determines the degree of support for a rule of tax law, this also influences the willingness of taxpayers to pay their taxes.

34 Weisbach (1999, p. 860). See more extensively about the Dutch GAAR ("fraus legis") which is introduced by the courts (Dusarduijn & Gribnau, 2018, pp. 16-19).

Terms in a rule such as 'reasonable' or 'customary' are called standards. They constitute a specific kind of legal norms containing broad evaluative terms – in contrast with narrow detailed drafting. If a standard is included in the text of law, reference is made to an external valuation for establishing the content of the norm, a valuation originating from the social system outside the legal system (Rustenburg, 2020, p. 278).[35] According to Alexander and Sherwin (2001, p. 29) standards "are posited norms that contain vague or controversial moral or evaluative terms in their formulations." Well-known examples are a ban on excessive speed, the requirement of competence, good customs (morals), good faith, or reasonable behaviour. The legal philosophers MacCormick and Summers point at the "evaluative openness" of these expressions. These concepts have "but little descriptive meaning over and above their evaluative component" (Alexy & Drier, 1991, p. 75). Sunstein (1996, p. 27) argues that the nature of the provision thus cannot be read from its text, and "everything will depend on interpretative practices". Moreover, a standard must often be applied in many different factual contexts and across those contexts a uniform formula would make little sense.

Although the legislature is the creator of a standard, the substantive interpretation belongs to the field of the judiciary (Rustenbug, 2020, p. 245).[36] Standards thus belong to the domain of the courts. They have to fill them with 'descriptive meaning', specifying their content and scope to match as well as possible their 'evaluative component'. It is left to the courts to flesh out these standards and to determine their exact meaning. By specifying the content of a standard, the judge thus creates a rule (ex post). The courts are likely to proceed casuistically. Case law thus shows the development of the descriptive meaning in the course of time.

This also goes for standards in tax law. Maybe the most famous Dutch example of a standard in tax law is 'sound business practice' (*goed koopmansgebruik*, which determines annual profit accounting; see Section 3.25 Personal Income Tax Act 2001 (*Wet Inkomstenbelasting 2001* – Essers & Russo, 2008, pp. 34-36).[37] This standard is laid down in legis-

35 Rustenburg (2020) refers to this social system as "the real system".

36 An "uncoupling of the rule itself and its content", see Rustenburg (2020, p. 245).

37 In German "goed koopmansgebruik" is translated as "guter Kaufmanssbrauch".

lation to enable law to be responsive to changing opinions concerning law in a community – adding a degree of flexibility in the law. Flexibility is needed in order to keep pace with societal, economic or technical developments rather than to respond to different situations. One of the reasons is that the legislature possesses insufficient technical knowledge to formulate clear and distinct rules. The matter in hand may also be too complex conceptually to be regulated in detail.[38] Interestingly, it is up to the taxpayer to fill in the details of the standard, rather than the tax administration. This standard offers the taxpayer a wide margin of freedom to make a choice between several options of tax accounting (Gribnau, 2010, p. 154). His choice is controlled by the courts. The annual profit is determined according to *goed koopmansgebruik* which is related to the principle of business economics. This standard has little descriptive meaning and seems to damage legal certainty. Nonetheless, the entrepreneur (or his bookkeeper or accountant) is thought to be acquainted with tax accounting practices. This expertise provides the entrepreneur with a quite a degree of legal certainty.

Substantive tax law also offers other examples. To prevent base erosion, Article 10a of the Corporate Tax, an anti-abuse provision, contains the open-ended standard "a reasonable levy according to Dutch standards" (Parliamentary Papers, 1995/1996).[39]

The content of the norm to be applied, and therefore of the decision or action to be taken, are not completely fleshed out in legislation. This is the courts' job. The legislature explicitly leaves the task of determining the actual norm, i.e., legislating, to the judiciary who acts as a deputy-legislature – though the legislature sometimes interferes with case law deemed inexpedient. Thus, the judiciary has to provide the taxpayers with legal certainty by providing ex post content.

Standards leave deliberately more room for evaluation by (the tax administration) and the courts than detailed rules. This enables effective and flexible action and individual dispensation of justice. It is the judiciary's task to remedy the indeterminacy by specifying standards

38 Other examples are 'bad faith' (when to file a tax return) and 'gross culpability' in the context of fines.

39 This standard was partly a codification of existing case law and partly a corrective measure in response to existing case law. It was introduced in spite of the Dutch Council of State's plea in favour of a more precise legislative norm. This standard did not last long. Quite quickly after the introduction it was replaced by a precise norm, i.e., a fixed rate.

which consequently evolve in case law. However, a statutory standard may give the taxpayer little grip in spite of the existing case law. Flexibility may go at the expense of legal certainty, because tax consequences of transactions become less predictable.

Some anti-avoidance provisions to prevent undesirable use of tax legislation are a case in point. They are deliberately formulated too broadly to put off taxpayers. Due to the over-inclusiveness, more cases fall under the rule than justified by the underlying aim of the rule. The result is uncertainty for taxpayers. Moreover, the principle of equality is at stake for uncertainty may chill taxpayers who are in good faith who end up paying more than their due.

In this vein, Poiares Maduro (Case C-255/02, 2005, para. 77) argues:

> "Legal certainty must be balanced against other values of the legal system. Tax law should not become a sort of legal 'wild west' in which virtually every sort of opportunistic behaviour has to be tolerated so long as it conforms with a strict formalistic interpretation of the relevant tax provisions and the legislature has not expressly taken measures to prevent such behaviour."

Though the courts are attributed the task of giving meaning to standards, at an earlier stage the tax administration has to make a choice as to the specific meaning of standards in the assessment procedure. Consequently, the taxpayer depends for legal certainty (and therefore equal treatment) on the tax administration. In doing so, the tax administration exercises power over the taxpayer. The tax administration while counteracting tax avoidance may opt for an over-inclusive interpretation of standards which lacks impartiality to put taxpayers off (*chilling effect*) – at the expense of the principle of equality. Of course, the courts check the tax administration's interpretation.

However, few taxpayers disagreeing with the tax administration's interpretation will actually lodge an appeal to challenge that interpretation – tax procedures being time-consuming, stressful and often costly (Gribnau, 2010, pp. 153-154). Standards therefore may imply a shift of power from the legislature to the tax administration – although in the end checked by the courts. The tax administration should therefore exercise moral self-restraint. The introduction of standards thus requires the legislature to balance principles, like legal certainty and equality, and having a good understanding of the tax administration's legal practice and moral climate.

In some contexts, it might be advisable to substitute precise rules for standards. These rules specify outcomes and provide clarity with regard to the content of law in advance of applications of the law, whereas the meaning (content) of a standard will develop casuistically and depend on interpretative practices (Sunstein, 1996, p. 21, 27). By providing the ex-ante content clarity (legal certainty) is enhanced to the benefit of both taxpayers and tax authorities. But the story of rules and standards is not that simple. Neither rules nor standards are perfect drafting styles. As Dean argues, no matter how well tailored to a particular context, a highly specified rule with a set of readily observable criteria "is likely to be perceived as unduly rigid in at least some cases". By the same token, since the content of a standard depends on what happens when it is applied, "even the most elegant standard, will fail to provide adequate guidance in others" (Dean, 2011, p. 556).[40]

From an economic point of view, it can be noted that precise rules are costly to construct, but reduce costs, for example costs of conflicts and litigation, since there will be less disagreement about the correct application of narrow, detailed rules. A high level of specificity may indeed lower the costs of application, saving a great deal of effort, time and expense. However, even "significantly lower post-implementation costs" could "be dwarfed by increased rulemaking costs" if the legislature is unable to agree on the specification of the appropriate rule (Dean, 2011, p. 558). As Sunstein (1995, p. 965) says: "Sometimes people can agree on a standard when they cannot agree on its specification". An incompletely specified standard may be the best the political or regulatory system can do, allowing for shared commitment on a framework to decide particular cases.

The legislature facing the choice between narrow detailed rules and standards has to balance principles, like legal certainty and equality. The relative weight of the various principles involved must be established. This relative weight is case-related, the weight of a principle depends

40 He criticises efforts to substitute international tax rules for decades-old standards (the arm's length method and cross-border treaty-based information exchange – providing only a broad sketch of the obligations it imposes). To his mind enhanced rule-based information exchange requirements and formulary apportionment, identifying a set of readily observable criteria will undermine the legitimacy of any international tax regime.

on the particular type of situation. Taxpayers may, for example, deliberately search the law for uncertainty which they might take advantage of. These taxpayers apparently prefer gaming the uncertainty inherent in the law to the certainty which is also present in the same law. "They deliberately leave a passable road, where a toll is levied, to enter a marsh, where they think they do not have to pay that levy" (Gribnau, 2013, pp. 92-93). Legislative standards to counter abuse create a degree of uncertainty because they are deliberately formulated in broad terms. To our minds, this curtailment of legal certainty in order to protect equality is justified provided that the standard is not disproportionally over-inclusive.

Principles-based legislation

Introduction

The third drafting style we deal with is principles-based legislation. This style might seem a perfect remedy to tax systems consisting of dense thickets of often thorny rules. Major simplification might be realised by legislating in accordance with clear, coherent tax principles. Avery Jones has already argued for less detailed legislation interpreted in accordance with principles – drawing on the famous distinction between rules and principles made by Dworkin (see the second section of this chapter).[41] He concludes that what "we need is less detailed legislation construed in accordance with principles, not a continuation of the plague of tax rule madness" (Avery Jones, 1996, p. 89).

Layers of tax rules go at the expense of transparency of the tax system and principles such as legal certainty (and its various elements) and equality. Thus, Avery Jones (1996, p. 590) argues for a shift from narrow, detailed drafting to a principled approach. To his mind the higher level of abstraction accounts for the principle being "something external to the rules which helps one to construe the rules". In our view, the term 'external' should not be taken to mean that the abstract principle it not an operative rule itself, as will be argued in this section.

41 Pleas for principles-based legislation are also to be found in other contexts, for example ethics. With regard to ethical decision-making, rule-based legislation might lead professionals to simply "follow the rules" rather than actually to try to find out the best solution to the problem at hand; in a business ethics context Norman (2011) advocates "compelling principle-based guidance for when exactly firms in competitive markets must constrain themselves from pursuing profitable opportunities (that is, genuinely profitable, all things considered) that are legal but possibly unethical or irresponsible".

Braithwaite (2005, p. 147) seems to follow up on Avery Jones' point. He proposes a theory to make law more certain for complex, dynamic domains. It starts with defining overarching principles and making them binding. Next, a set of rules specifying the most commonly used types of transactions or business arrangements in a complex domain of tax law is defined. Such rules are introduced explicitly as 'no more' than examples of how the principles apply, since they are not intended to be exhaustive. The overarching principle has special status in the sense that it provides more than just interpretative guidance which shows when a rule and the principle are in conflict. The overarching principle is namely used to assist in interpreting the rule, moreover it is binding, "with the rules to be used only to assist in applying the principle" (see also Weisbach, 1999, p. 870). Thus, "more general, open-ended principles that focus on substance rather than form, and are expressed purposively or in policy-oriented terms" may be an alternative to (regulatory) formalism (Picciotto, 2007, p. 14). This view on the use of principles as a drafting style is quite close to the conception of principles as set out by MacCormick (1978). He explains the distinctive meaning of principles in this way: "to express the policy of achieving that end, or the desirability of that general mode of conduct, in a general normative statement, is, then to state 'the principle of the law' underlying the rule or rules in question" MacCormick (1978, p. 156).[42] Or rather, as Freedman argues, these norms express the intended outcome and are "part of the fundamental architecture of the tax system" (Freedman, 2010, p. 735).

A strict definition of principles-based drafting seems impossible. "The term is not one with a precise and agreed meaning", for it is used by different people to mean different things (Cooper, 2010, p. 341). Some examples of principles-based drafting will therefore be helpful. An example taken from Dutch tax law reads: "Wage is all that is enjoyed from employment or past employment, including what is reimbursed or provided in the course of employment" (Wage Tax Act 1964, art. 10, s. 1); this principle is followed by more detailed rules. And another Dutch principle: "Profit from business activities (profit) is the amount of the total benefits which, under whatever name, are earned from a business"

42 Cf. Gribnau (2014, pp. 193-194). Filipczyk distinguishes another kind of principles, namely "construction principles" that are medium level: they are less abstract than principles of the Dworkinian type but more abstract than PBL-principles. They set out "the nature of tax" or 'the legal character of tax" (Filipczyk, 2017, p. 271).

(Income Tax 2001, art. 3.8). Both principles are very abstract and general and intend to cover a wide range of situations. The intended policy outcome is to determine the type of tax base, that is 'wage' and 'profit' respectively.

Cooper gives the example of the so-called Single Entity Rule in section 701-1 of the Income Tax Assessment Act 1997 of Australia which is the central operative provision of the corporate consolidation regime:

> "(1) If an entity is a subsidiary member of a consolidated group for any period, it and any other subsidiary member of the group are taken for the purposes covered by subsections (2) and (3) to be parts of the head company of the group, rather than separate entities, during that period."

Cooper cites subsequently the view of the Australian Taxation Office on this provision: "Parliament has expressed its intended policy outcome in broad and simple language, in this case by equating a consolidated group with a single entity".[43] Thus, the principle is broad and will apply in all situations without the need of a massive set of detailed rules (Cooper, 2010, p. 354).[44]

Though the principle employed in principles-based drafting is not easy to define, from the foregoing examples some features can be derived. Cooper (2010, pp. 341-342) distinguishes between three features. First, "a principle is an operative rule". Thus, a principle is a directly applicable legal norm rather than a norm external to the rules which helps to construe the rules (Avery Jones, 1996). Secondly, it is "a statement about an intended outcome, rather than a provision which sets out the means for accomplishing the outcome". Rules spelling out in great detail what is intended are replaced by a statement on a higher level of abstraction about the intended outcome. Thirdly, because of the generality of the terms used and the rejection of the elaboration of detail a principle is intended to be comprehensive, applying to a wide range

43 The explanation continues "A necessary feature of this drafting approach is the omission of statutory mechanisms for effecting the policy for each provision of the income tax law" Cooper (2010, p. 347).

44 Cf. Cooper (2010, p. 354) "The goal was to find a general principle which defined a discrete group of transactions ('financial arrangements') by reference to a series of observable generic characteristics."

of facts and circumstances.[45] The generality of the terms accounts for a much broader scope than a detailed rule.

Shifting perspectives and conceptions

At this stage we might ask ourselves how principles-based drafting style compares with Dworkin's approach? Let us return to the difference between principles and policies. As shown above, according to Dworkin, principles express moral requirements whereas policies do not (Dworkin, 1997, pp. 22-23).[46] The use of principles intends to introduce the moral dimension of law, not as something accidental, but as a feature inherent to the very concept of law. So, law does conceptually depend on moral considerations.

Moreover, Dworkin (1997) points at a second difference between principles in the narrow sense and policies: the legislature states a policy and formulates a rule or a set of rules to achieve a policy goal. For Dworkin, however, this is not a feature of principles in the narrow sense, for they are not constructed by the legislature. "The origin of [...] legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time" (Dworkin, 1997, p. 40). This specific origin accounts for a kind of ;empty place; which cannot be occupied by any law-making power (Gribnau, 2014, pp. 195-198).

With regard to the first difference, it is clear that the hallmark of principles-based drafting is the use of principles without any reference to values which are external to legislation. There is no necessary connection to morality, viz. an appeal to values. These principles are policy outcomes. They implement the legislative purpose. From a Dworkinian point of view these principles seem to be more like policies than principles. However, a closer look reveals that they are rules – which Dworkin distinguishes from both policies and principles. Indeed, this kind of principle is "an operative legislative rule which specifies the outcome

45 Cooper (2010, pp. 341-342). He subsequently deals with three claims – about certainty, legislative effectiveness and economic efficiency – made in support of principles-based drafting.

46 However, the distinction can be collapsed according to Dworkin. For example, a policy may be construed which states a principle – so as to realise "a requirement of justice or fairness". In this way, a policy incorporates a principle and consequently embodies a dimension of morality. Dworkin (1977, pp. 22-23).

[…] and expresses the outcome at the highest possible level rather than itemising a list of outcomes for every conceivable case" (Avery Jones, 1996; Pinder, 2005).

The absence of the morality dimension (flowing from the difference between principles and policies) therefore leads to another conclusion, connecting to the Dworkinian difference between principle and rules. These principles have to be structured logically so as to work together to achieve the legislative purpose. Thus, a framework of a specific piece of legislation results: a pyramid with one or more principles at the top and, next specific sets of rules for the most commonly used types of, for instance, transactions and/or "carving out exceptions to the basic fall-back rule" (Braithwaite, 2005, p. 149; Krever, 2008, p. 194). When new situations emerge, a properly constructed principle provides a framework for working out how to deal with them. In short, a principle is not just a less specific rule, but it is a general statement about the essence of the intended outcomes in a general field. It is sufficiently determinate and directly applicable legal norm so as to operate as a fall-back rule (Filipczyk, 2017, p. 278). Probably, the term 'principle' is used because it regards a statement on a high level of abstraction using very general terms. Nonetheless, from a Dworkinian perspective it is a rule, though a very abstract and general one (Cooper, 2010, p. 341).[47] We will use the term 'principles-based drafting' since it is established in literature. Besides, replacing it by the term 'rules-based drafting' would be very confusing.

Thus, we arrive at Dworkin's second difference between principles in the narrow sense and policies: it is up to the legislature to state policies. Policies are the outcome of the legislative process. This also goes for principles featuring in principles-based drafting since they are policy outcomes. It is assumed that these principles are something which the legislature constructs – not some standard preceding any legislative activity. For advocates of principles-based legislation as Judith Freedman explains, the principle is an expression of the scope that the legislature has decided to give to a legislative rule, "a charging provision or relief and, since it leaves no room for judicial law-making, it does not invite judgments based on morality" (Freedman, 2010, p. 730). Principles, therefore, are not some standards with an aspirational

47 "the principle is a rule" (Cooper, 2010, p. 341).

aspect external to the legislature, but the legislature's domain par excellence - a far cry from Dworkin's position with regard to principles in the narrow sense.

In sum, from a Dworkinian point of view, principles-based drafting style features rules, with no necessary connection to morality, rather than normative (moral) principles, which are issued by the legislature rather than originating in a sense of appropriateness developed in the profession and the public over time.

Principles-based drafting in context

Principles-based drafting is not a purely theoretical exercise. Australia and the UK, for instance, took steps to decrease the level of precision with which tax rules and their provisions are drafted and started experimenting with principles-based drafting (Sawyer, 2007, p. 408).[48]

The UK Government's pre-budget review of October 2007 announced a new approach to tax simplification in order to help businesses by, amongst other things, reducing their administrative burdens and enhancing "the City's competitiveness by simplifying and modernising the tax system for financial services" (HM Treasury, 2007, p. 63). This approach included a proposal for consultation "principles-based responses to avoidance involving disguised interest to improve clarity and certainty" (HM Treasury, 2007, p. 68). Countering tax avoidance is driven by the goal of ensuring that taxpayers pay their due. Principles-based drafting is thus also seen as a means to enhance normative legal principles like legal certainty, equality and ability to pay (distributive justice).

Australia also has some experience with principles-based drafting.[49] Pinder (2005) explains how this drafting approach translates intended tax policy outcomes into 'principled rules' in tax law and argues that the resulting law can be more certain, less complex and more flexible than the current black letter tax law approach. To his mind, a principle means something to readers because it relates to their understand-

48 New Zealand opted for a hybrid approach of developing core provisions (like principles), with in the main parts general provisions, followed by more detailed provisions and exceptions to those provisions.

49 The Australian government's principles-based approach is known as the coherent principles approach.

ing of the real world. However, as Freedman (2010, p. 730) observes, "one major problem with using principles in the tax law area is that tax law is very abstract and may not always relate well to the real world". Clear policy is therefore the *sine qua non* for clear tax legislation and this policy must be accurately and transparently translated into principles (Sawyer, 2013, p. 321). Principles enhance certainty by providing context which relates well to the real world. As Marmor argues, context matters for interpretation, and should therefore be familiar and clear to the principle's intended audience (Marmor, 2001, p. 75). In this vein, Pinder (2005, p. 2) says "When a principle works, it does so because the essence it captures appeals to readers at other than an abstract intellectual level; it means something to readers because it relates to their understanding of the real world". Freedman (2010, p. 730) concludes that by providing the context the principle "provides greater certainty than the alternative of detail" (see also Braithwaite, 2002, p. 75).

Principles-based drafting to enhance Dworkinian principles

Principles-based legislation, like all drafting styles, should respect Dworkinian principles, such as the principle of equality and the principle of certainty. Considering that detailed tax legislation has also grown in complexity, it seems that the adoption of a principles-based approach in the drafting of statutes would lead to greater simplicity (Gribnau & Dusarduijn, 2018). A principles-based approach would indeed lead to a complexity reduction of tax law, at least in the length (sheer quantity) of the law considering the replacement of various detailed rules by a small number of general principles and a limited number of rules that exemplify the scope of the principle.

The most contested element of using principles in legislation is the level of clarity, i.e., the level of (un)certainty of its application (see Freedman, 2010, p. 721; Smith, 1997, p. 169).[50] Rules are seen as precise and detailed and therefore would provide more clarity and certainty. However, one might challenge this assumed high level of certainty

50 In the UK, the Hansard Society Commission on the Legislative Process (1992) recommended against general principles drafting on the basis that there "would have to be much more recourse to the courts to settle disputed interpretations of Acts" and that "certainty in the law must be the paramount aim in the drafting of statutes". See Smith (1997, p. 169). This is linked with the issue of trust and uncertainty related to law-making, cf. Freedman (2010, p. 721): "If rules can be read subject to principles then, it is argued, this transfers power to the courts and administrators and creates a degree of uncertainty".

often connected with legislation based on narrow, detailed rules alone. The more precise these rules are, the more complex and perhaps thorny the resulting thicket of rules will be (IMF/OECD, 2017, p. 44).[51] This will inevitably leave gaps in legislation and therefore will, in the end, give rise to 'unintentional non-compliance' and '(un)intentional overcompliance' and scope for manipulation or creative compliance (see section *Comprehensive detailed tax legislation* on p.177, and Brathwaite, 2005, pp. 63-64).[52] Moreover, clarity – thus, certainty – of rules depends on the expertise of those who are reading it, the users (Black, 2008, p. 1). The greater risk of internal inconsistencies in application of detailed rules might in the end lead to a more uncertain legal system (Braithwaite, 2002, pp. 47-82).[53] In that respect, principles-based legislation might be seen as less precise but more predictable, thus more certain in the long run (Cooper, 2010, p. 343).[54] However, achieving a high degree of certainty (and equality) is only possible by devoting a great deal of time and expertise to considering and perfecting the underlying policy and (overarching) principle and how they is expressed in words. The same goes for the specific rules for the most common situations which are intended to be within, or outside, the scope of the principle. Of course, this is easier said than done.

In terms of legal certainty, principles-based legislation could contribute to constancy and stability of statute law. The overarching principle is 'unfolded' in rules that exemplify the scope of the principle. It guides the interpretation of the exemplifying rules. Importantly, the principle is binding when it conflicts with a rule; the rules are used only to assist

51 "A principles-based approach to drafting can help strike an appropriate balance in the inherent trade-off between certainty and simplicity" (CF IMF/OECD, 2017, p. 44). See also, www.oecd.org.

52 Braithwaite (2005, pp. 63-64) points out: "The classic process of writing more and more specific rules over time to cover newly discovered loopholes and apparent inconsistencies makes the body of rules as a package less capable of consistent assessment." The greater the smorgasbord of rules, "the greater the discretion of regulators to pick and choose an enforcement cocktail tailored to meet their own objective."

53 For a more in-depth analysis, see Braithwaite (2002, pp. 47-82). Braithwaite notes that as regulated phenomena become more complex, principles will deliver more consistency than rules as the iterative pursuit of precision in single rules increases the imprecision of a complex system of rules.

54 Avery Jones also defends this view, stating that principles-based regulation would reduce the amount of detail necessary because the principles would give predictability. Therefore, this type of regulation would give as much, or more, certainty than would great detail. See Avery Jones (1996, p. 85).

in applying the principle. Thus, in hard cases the 'top' principle works as a fall-back rule and provides certainty. In this way, there is no need for an exhaustive non-transparent system of rules to regulate every possible concrete arrangement or to lock the stable doors after the horses have bolted (which takes time creating a patch of uncertainty) (Eden, 2017, p. 742).[55] The principle at the top works like a safety net.

Again, principles-based legislation should respect Dworkinian principles. The overarching principle and accompanying set of illustrative rules must thus be designed so as to provide the taxpayers who are in good faith with a reasonable degree of certainty. On top of that, principles-based legislation should not be used to put taxpayers off (*chilling effect*) which may even entail a violation of the principle of equality, since uncertainty may chill taxpayers who end up paying more than their due.

Summarising, principles-based drafting calls for an optimal balancing of different Dworkinian principles. These rule-like-principles implement the legislative purpose (scope). They are more 'open-ended rules', more general and less detailed statutory provisions. They are less precise, in the sense of a lower level of particularity. In this respect principles-based drafting may provide less legal certainty. However, stability, another element of legal certainty may be enhanced. The legislature therefore should consider and express the underlying policy very carefully. A high degree of certainty (and equality) requires a precise expression of the overarching principle and the set of rules for the most common situations which are intended to be within, or outside, the scope of the principle.

Conclusion

Taxation and paying taxes involve deep moral and legal values and (normative) principles. These values and principles are no absolutes and always must be balanced against other values and principles in the case or situation at hand. Rules are key elements of the tax system. They serve fundamental legal values such as predictability and certainty. Other values and principles are at play in taxation as well: equality, distributive justice, ability to pay, neutrality, proportionality, etc.

55 (Mandatory) rules prescribing disclosure of tax avoidance schemes (DOTAS) enable counteracting measures to be taken more quickly.

In many countries, however, tax legislation is grounded in narrow, detailed rules. This rule-based drafting style focuses on precise and highly detailed rules to cover a whole range of possibilities rather than a simple statement of policy. As a result, many tax systems are populated by dense thickets of often thorny rules. The existing urge to spell out in great detail what is intended has quite a few drawbacks. The system of tax rules becomes incomprehensible for many and lacks durability; it compromises fairness, consistency and coherence.

Fictions, standards and principles-based legislations are three drafting styles legislatures may deploy to counteract the drawbacks and disadvantages of overcomplicated tax legislation. Each 'technique' minimises the presence of details in legislation, using a different approach. Where the interpretation of the content and scope of standards relies solely on the judiciary, this is the domain of the legislature when using fictions or principles-based legislation. All drafting styles should respect Dworkinian principles, such as the principle of equality and the principle of legal certainty. All law-making should be a matter of principle. The weight of these embedding principles has to be established and they have to be balanced.

This balancing has to be done in a particular context. For example, legal certainty may carry less weight for those engaging in aggressive tax planning (Wheatcroft, 1955, 218).[56] The principle of equality (distributive justice) then outweighs the principle of legal certainty. Different contexts may call for different drafting styles. In practice, the legislature has to aim for a prudent mix of legislative styles in order to optimise the quality of tax legislation. No style should be viewed as a cure all. They are friends, not enemies.

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56 "It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers" (Wheatcroft, 1955, p. 218).

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