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"THE PRODUCERS" OF TAX ABUSE: THE CORRUPTING EFFECTS OF TAX LAW AND TAX RELIEFS IN THE U.K. FILM INDUSTRY

LORENZO PASCULLI[*] & STUART MACLENNAN[**]

I

INTRODUCTION

Mel Brooks's famous film, *The Producers*, tells the tale of a dishonest theatrical producer, Max Bialystock, who contracts the services of accountant Leopold Bloom. While auditing Bialystock's latest accounts, Bloom discovers that "[u]nder the right circumstances, a producer could make more money with a flop than he could with a hit." Bloom's discovery was, in essence, that legal and financial structures for producing plays and musicals provided an opportunity for a "dishonest man" to "make a fortune" by defrauding investors in the production. Bloom, an impressionable young accountant of previously unimpeachable character, soon finds himself drawn into a fraud. As often happens, reality exceeds fiction. For decades, tax reliefs[1] offered by United Kingdom (U.K.) law on qualifying film production expenses—so-called, "film tax relief"—have been incentivizing and attracting something less welcome than the desired investment in the local movie industry. These reliefs have provided opportunities and motivations for systemic tax abuse. Such abuse includes tax evasion—that is, criminal behavior such as fraudulent tax relief claims for movies that were never to be made[2]

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[1] The U.K. tax authority broadly defines a tax relief as paying "less tax to take account of money you've spent on specific things, like business expenses" or getting "tax back or get[ting] it repaid in another way, like into a personal pension." *Claim Income Tax Reliefs*, GOV.UK, https://www.gov.uk/income-tax-reliefs (last visited Nov. 12, 2022).

[2] *See, e.g.*, Stuart Kemp, *Four Sentenced in U.K. Film Tax Incentive Fraud Case*, HOLLYWOOD REP. (July 22, 2013), https://www.hollywoodreporter.com/business/business-news/four-sentenced-uk-film-tax-590090/; Geoffrey Macnab, *Documentary Chancers Shows How British Feature Film Producers Fraudulently Used Film Tax Relief*, INDEPENDENT (Jan. 8, 2016), https://www.independent.co.uk/arts-entertainment/films/documentary-chancers-shows-how-british-feature-film-producers-fraudulently-used-film-tax-relief-a6802096.html (cited as examples of movies that were never made).

or based on false invoices.[3] Such abuses also include tax avoidance—that is, elaborate contractual and business arrangements that exploit the law to recategorize otherwise taxable activities in a non-taxable form.[4] These forms of abuse are systemic in many ways.

First, the legal system as a whole operates as a corrupting environment. Abuses appear enabled not just by occasional loopholes in tax legislation, but by the broader interactions between norms and institutions, such as courts and enforcement agencies, in various areas of the law. Many of these cases involved the exploitation of business structures and complex contractual arrangements designed to turn film investments into losses to offset other sources of income. Second, they cause the proliferation of collective and well-organized efforts across entire industry sectors. Devised and marketed by accountancy firms, these schemes promised tax savings that attracted hundreds of investors,[5] including celebrities such as David Beckham, Robbie Williams, Geri Halliwell, and Andrew Lloyd Webber.[6] The gradual expansion of film tax relief into a broader relief covering other creative industries enabled similar tax practices in those sectors as well.[7]

Like Mel Brooks's movie, these cases are a powerful illustration of the unintended corrupting effects of tax law—corrupting, rather than criminogenic, because the law not only

[3] David Brown, *Film Director Who Attacked Press Ethics is Jailed for Fraud*, TIMES (July 2, 2016), https://www.thetimes.co.uk/article/film-director-who-attacked-press-ethics-jailed-for-fraud-f0sjmrd2f.
[4] *See* Doreen McBarnet, *Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 BRIT. J. SOCIO. 323, 323 (1991) (commenting on fraud insurance for tax avoidance); PETER ALLDRIDGE, CRIMINAL JUSTICE AND TAXATION 26 (2017) (discussing taxation in the criminal context). *See also* Diane Ring & Costantino Grasso, *Beyond Bribery: Exploring the Intimate Interconnections between Corruption and Tax Crimes*, X LAW & CONTEMP. PROBS. X, X (2022) (discussing the notion of "tax abuse" from a legal and practical perspective).
[5] *See* Ring & Grasso *supra* note 4, at X (discussing the practice of "sweetheart" tax deals and their unethical implications).
[6] Paul Bignell, *A Major Film-Making Scheme Exploited Loopholes in the Noughties. Now HMRC Wants Its Money*, INEWS (Aug. 31, 2018), https://inews.co.uk/news/uk/hmrc-tax-avoidance-film-making-scheme-little-wing-192893; Geoffrey Macnab, *Ingenious Scores Appeals Court Victory in Long–Running Battle with HMRC*, SCREEN INT'L (Aug. 6, 2021), https://www.screendaily.com/news/ingenious-scores-appeals-court-victory-in-long-running-battle-with-hmrc/5162262.article.
[7] Ingenious Games LLP v. The Commissioners for Her Majesty's Revenue & Customs [2016] UKFTT 0521 (TC); Ingenious Games LLP v. The Commissioners for Her Majesty's Revenue & Customs [2019] UKUT 0226 (TCC); Ingenious Games LLP v. The Commissioners for Her Majesty's Revenue & Customs [2021] EWCA Civ. 1180 (TCC).

enables crime but also other illegal, non-criminal, or even formally legal behaviors that abuse the law for private gain. This problem is not limited to tax law and tax abuse—any area of law can inadvertently enable crime[8] or corrupt practices.[9] However, the phenomenon appears to be particularly insidious in the area of taxation. Herein, the law prompts not only overt violations of its provisions, but more sophisticated arrangements that, while conflicting with the elusive purposes of the law, are formally compliant with and based on such provisions. This makes the illegality of such arrangements particularly controversial, thus compromising enforcement. The judicial history of key tax avoidance cases in the U.K. film industry suggests not only that these schemes are expensive and time-consuming to detect, investigate, and prosecute, but that the uncertainty about their legality can frustrate even the most resourceful enforcement efforts.[10] Moreover, the availability of legal structures open to exploitation prompted the emergence of an industry specializing in how to manipulate them[11] and the dissemination of abusive schemes across various industry sectors, which multiplies their harmful effects.[12] The sums involved in these schemes have been estimated to impair U.K. revenue collection in the amount of £5 billion per annum.[13]

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[8] Hans-Jörg Albrecht & Michael Kilchling, *Crime Risk Assessment, Legislation, and the Prevention of Serious Crime: Comparative Perspectives*, 10 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 23, 23 (2002); CRIMINAL PREVENTIVE RISK ASSESSMENT IN THE LAW-MAKING PROCEDURE 1, 1 (Hans-Jörg Albrecht, Michael Kilchling & Elizabeth Braun eds., 2002); Ernesto U. Savona, *Proofing EU Legislation Against Crime*, 12 EUR. J. ON CRIM. POL'Y & RSCH.177, 177–78 (2007).

[9] *See generally* Alexander Kotchegura, *Preventing Corruption Risk in Legislation: Evidence from Russia, Moldova, and Kazakhstan*, 41 INT'L J. PUB. ADMIN. 377, 377 (2018) (discussing methods to prevent corruption risks triggered by legislation); Lorenzo Pasculli, Corruptio Legis: Law as a Cause of Systemic Corruption: Comparative Perspectives and Remedies Also for the Post-Brexit Commonwealth, in PROCEEDINGS OF 6TH ANNUAL INTERNATIONAL CONFERENCE ON LAW, REGULATIONS AND PUBLIC POLICY 189, 189 (2017) (providing an overview of the corrupting risks of the law and possible remedies).

[10] *See VIRTEU National Workshop: United Kingdom*, video recording (July 23, 2021), https://www.corporatecrime.co.uk/virteu-workshop-uk (on some of the challenges that unclear boundaries between legal and illegal tax practices pose to law enforcement).

[11] Doreen McBarnet, Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?, 15 J. L. & SOC'Y 113, 115 (1988).

[12] *See* Branislav Hock, *Policing Fiscal Corruption: Tax Crime and Legally Corrupt Institutions in the United Kingdom*, X LAW & CONTEMP. PROBS. X (2022) (discussing how tax crimes contribute to generate inequalities).

[13] *See* ALLDRIDGE, *supra* note 4, at 27; *Morality, Money and Tax*, TIMES, June 21, 2012, at 2 (citing the amount the UK loses per year).

Given the shortcomings of enforcement, prevention becomes key. Traditional remedies have been very reactive, rather than preventive—with legislation rushing to close loopholes exploited by inventive applications of the law exposed by enforcement activities.[14] More recently, a growing body of literature has emphasized anti-avoidance and anti-abuse rules as a possible remedy against exploitations of the law which were not intended by legislators.[15] But these remedies do not address the systemic dimensions of the problem, as they largely focus on tax law design. This focus is insufficient to comprehensively assess the corrupting effects of the legal environment, which—as we shall see—are often rooted not in tax legislation alone but in more complex interactions between tax law and other areas of the law, such as company or commercial law, and broader institutional structures and processes. More innovative and preventive solutions to proof the whole legal system against abuse are required. Environmental criminology and situational crime prevention can be particularly helpful in this respect.

Environmental criminology analyzes crime, rather than criminals, to understand how the environments in which crime occurs can facilitate it,[16] and to identify solutions such as environmental design[17] aimed at removing criminogenic patterns. Sidebottom and Tilley have argued that the way systems, including taxation systems, are designed affects the production, distribution and reduction of crime.[18] Their argument is in line with sociological and legal studies suggesting that legal systems can produce systemic corruption or tax avoidance.[19]

[14] Anthony Seely, House of Commons Library, Tax Avoidance: A General Anti-Abuse Rule, 2019-2021, HC 6265, at 3.
[15] Cihat Öner, Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance?, 29 EC TAX REV. 38, 48 (2020).
[16] *See generally* Paul J. Brantingham & Patricia L. Brantingham, *Introduction: The Dimensions of Crime*, *in* ENVIRONMENTAL CRIMINOLOGY 7 (Paul J. Brantingham & Patricia L. Brantingham eds., 2d ed. 1981).
[17] *See generally* Rachel Armitage, *Crime Prevention Through Environmental Design*, *in* ENVIRONMENTAL CRIMINOLOGY AND CRIME ANALYSIS 259 (Richard Wortley, Michael Townsley eds., 2017).
[18] *See generally* Aiden Sidebottom & Nick Tilley, *Designing Systems against Crime*, *in* HANDBOOK OF CRIME PREVENTION AND COMMUNITY SAFETY 254 (Nick Tilley & Aiden Sidebottom eds., 2d ed. 2017).
[19] *See generally* Robert Tillman, Making the Rules and Breaking the Rules: The Political Origins of Corporate Corruption in the New Economy, 51 CRIME, L. AND SOC. CHANGE 73 (2009); McBarnet, supra note 11.

Situational crime prevention seeks to intervene in criminogenic environments, including legal environments, by removing the situations that can create opportunities, or strengthen motivations, for crime.[20] From this perspective, law can be an instrument to implement situational measures—for instance, by requiring taxes to be collected at source or imposing reporting or transparency obligations on relevant entities. Or, law can be the target of situational measures—for instance, where draft legislation is subjected to special risk assessment mechanisms to detect and mitigate any crime risks it might generate—so-called "legislative crime-proofing."[21]

Designing solutions to minimize the corrupting effects of tax environments presupposes an accurate mapping of the elements within the legal system that can generate or facilitate opportunities, motivations, and rationalizations of tax abuse—"juridical enablers" of tax abuse—.This mapping should also cover the combined effects of their mutual interactions—"aggregated juridical enablers" of tax abuse. This study offers an initial contribution to such mapping based on a comparative analysis of six tax abuse cases in the U.K. movie industry and the relevant elements of the U.K. legal system—that is, the framework of norms and institutions resulting from both the formal legal sources such as legislation and judicial decisions, and their practical application and interpretation by relevant authorities, so–called "law in action."[22] This

[20] *See generally* Ronald V. Clarke, *Situational Crime Prevention*, *in* ENVIRONMENTAL CRIMINOLOGY AND CRIME ANALYSIS 286 (Richard Wortley & Michael Townsley eds., 2017).
[21] *See generally* Ernesto U. Savona, *Proofing Legislation against Crime as Situational Measure*, *in* CRIME PREVENTION IN THE 21ST CENTURY: INSIGHTFUL APPROACHES FOR CRIME PREVENTION INITIATIVES 247, 247 (Benoit LeClerc & Ernesto U. Savona eds., 2016) (proposing and discussing a mechanism to assess the crime risks generated by proposed legislation); Ernesto U. Savona & Sara Martocchia, *Developing the Crime Risk Assessment Mechanism*, 12 EUR. J. ON CRIM. POL'Y AND RSCH. 325, 325 (2006) (same); Federica Curtol, Gloria Pesarin & Tom Vander Beken, *Testing the Mechanism on EU Public Procurement Legislation*, 12 EUR. J. ON CRIM. POL'Y AND RSCH., no. 3–4, 337, 337 (2006) (testing the crime risk assessment mechanisms proposed in the previous paper on European Union public procurement legislation); Ernesto U. Savona, Francesco Calderoni & Stefano Montrasio, *Finalising the Crime Risk Assessment Mechanism for the Crime Proofing Activities of European Legislation/Regulation*, 12 EUR. J. ON CRIM. POL'Y AND RSCH. 365, 365 (2006) (finalizing the proposed mechanisms with respect to European Union law).
[22] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910) (introducing the distinction between law in books and law in action).

broad notion of legal system is necessary to study the law as an "environment" and assess its effects on human behavior.

This article's inquiry can be significant both for theory and practice. The analysis of case studies in the area of taxation will generate knowledge and theorizations that can contribute to the development of a more systematic and interdisciplinary understanding of the unintended corrupting effects of the law as a whole system. The analysis includes a study of the corrupting effects of judicial decisions—a topic which remains under-researched.[23] The focus on systemic abuses also complements and integrates recent studies on the correlations between legal systems and systemic corruption.[24] The concepts and categories developed here might be employed, with necessary adjustments, in future studies on the corrupting effects of the law in different, non-tax related, areas of social and economic life. Pursuit of these questions advances the growing dialogue between law and criminology on tax evasion and avoidance.[25] From a practical perspective, the mapping of opportunity structures for tax abuse should identify elements and processes of the legal system that can be redesigned to minimize opportunities or motivations. This information should help lawmakers and law enforcement develop practical solutions to mitigate the risk of abuse. Sector-specific tax relief and its potential risks are not unique to the United Kingdom,[26] so this exercise should benefit policymakers in most jurisdictions and contribute to making law more proactive and preventative.

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[23] *See generally* Daniel Ostas, *Endogenous Tax Law: Regulatory Capture and The Ethics of Political Obligation*, X LAW & CONTEMP. PROBS. X, X (2022) (exploring the influence of judicial predispositions in US tax court cases).

[24] Lorenzo Pasculli, *Foreign Investments, the Rule of Corrupted Law and Transnational Systemic Corruption in Uganda's Mineral Sector, in* TRADE, INVESTMENT AND THE RULE OF LAW 84 (Rafael Leal-Arcas ed., 2020); Lorenzo Pasculli, The Responsibilization Paradox: The Legal Route from Deresponsibilization to Systemic Corruption in the Australian Financial Sector, 15 POLICING 2114 (2021).

[25] *See e.g.*, Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1153 (2021) and Rita de la Feria, *Tax Fraud and Selective Law Enforcement*, 47 J. L. & SOC'Y 240, 240 (2020) (both discussing criminological theories in relation to tax law).

[26] Indeed, such incentives are widespread globally. See Alexander Klemm, *Causes, Benefits, and Risks of Business Tax Incentives*, 17 INT'L TAX AND PUB. FIN. 315, 316 (2010) (showing tax abuses globally).

The next part briefly illustrates the methodology of this study. The third part presents an interdisciplinary review of the literature which informs the analysis of the case studies. The fourth part details the findings of such analysis, while the fifth part offers a critical discussion of such findings and possible recommendations for lawmakers and policymakers. The last part draws some conclusions.

II
METHODOLOGY

This study is part of an ongoing research project on the correlations between law and systemic corruption, comparing case studies from different industry sectors in various jurisdictions.[27] It also draws upon and integrates research carried out within the project dubbed VAT fraud: Interdisciplinary Research on Tax crimes in the European Union (VIRTEU).[28] This study adopts grounded theory methodology[29] to generate explanatory concepts and categories from a qualitative comparative analysis of six case studies of tax abuse in the U.K. film industry and the relevant legal frameworks. The analysis relies on various document-based sources: legislation, court decisions, policy documents, and news media. Qualitative case study analysis is ideal not only to conduct holistic and exploratory causal inquiries[30] but also to investigate environmental causes of crime, which tend to be highly crime-specific—especially opportunities—[31]and therefore require a focus on the forms in which crime manifest. The

[27] *See* works cited *supra* note 24 (discussing systemic corruption).
[28] VIRTEU (Vat fraud: Interdisciplinary Research on Tax crimes in the European Union) was a two-year international research project funded by the European Anti-Fraud Office (OLAF) of the European Commission (Grant Agreement no: 878619), which aimed at exploring the interconnections between tax crimes and corruption. All the documents produced as well as all the video recordings of the events organized over the course of the project are available online on the Corporate Crime Observatory, which serves as the long-term repository of the project outcomes. *Virteu*, CORP. CRIM. OBSERVATORY, https://www.corporatecrime.co.uk/virteu (last visited Nov. 11, 2022).
[29] *See generally* Barney G. Glaser & Anselm L. Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research (1967); Juliet Corbin & Anslem Strauss, *4 Strategies for Qualitative Analysis*, *in* Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory 65, (3d ed. 2012) (both illustrating grounded theory methodology).
[30] Robert K. Yin, Case Study Research: Design and Methods 3 (3d ed. 2009).
[31] Clarke, *supra* note 20, at 287–88.

comparison of behaviors in relation to different properties of the law in different cases should lead to identification of common patterns. Documental analysis is well suited to studying complex phenomena, such as the interactions between the legal system and systemic tax abuse, that appear across a large timespan.[32] Moreover, documental analysis is particularly valuable in a doctrinal examination of legislation and case law. The variety of documental sources available on the selected case studies also allows for a rigorous understanding of the specific forms of abusive schemes.[33] In particular, case law offers precise accounts of the facts of the cases, while policy documents such as His Majesty's Revenue and Customs (HMRC) guidance or press releases and interviews often record the perceptions, or the public positions, of individuals and authorities involved in the cases.

A. Case Definition and Selection

The U.K. legal system is the aggregated unit of analysis.[34] The sub-units are the six cases of tax abuse. Three of these—*Eclipse 35, Ingenious, Icebreaker*—are cases of tax avoidance. The others—*Animation, Little Wings,* and *Zodiac* and *Aquarius*—are cases of tax evasion. All the cases involve the use of legal structures—namely, film production companies or limited liability partnerships—to take advantage of various tax reliefs, such as film tax relief or sideways loss relief—meaning, use of a deduction against unrelated income. In evasion cases, such legal structures were employed as instruments of deception to falsely represent facts or transactions that never occurred.[35] In avoidance cases, such structures were used to qualify actual transactions in ways that were compatible with the letter of the law to enable the individual or entities involved to derive a benefit from the tax code not intended or envisaged

[32] YIN, *supra* note 30, at 101.
[33] Glenn A. Bowen, *Document Analysis as a Qualitative Research Method*, 9(2) QUALITATIVE RSCH. J. 27, 28 (2009).
[34] Lee Ellis, Richard D. Hartley & Anthony Walsh, Research Methods in Criminal Justice and Criminology: An Interdisciplinary Approach 224 (2021).
[35] An example of which might include an invoice for a service that was never provided, or that occurred in a way other than how it was represented, such as an overstated invoice for services actually provided.

by legislators. The legality of these arrangements depends therefore on the interpretation of relevant statutes.

The choice of the U.K. cases is significant for multiple reasons, some related to the forms of abuse and some related to features of the U.K. legal system. First, as to the forms of abuse, all selected cases are typical examples of systemic tax abuse. They all shared similar strategies to exploit legal structures, involved numerous—sometimes hundreds of—investors, and were imitated by different individuals and companies across the film industry. Second, all the cases attracted attention from authorities and media due to the considerable sums of money involved and the participation of celebrity investors. Third, such attention produced abundant evidence which can support a comprehensive documental analysis. Fourth, the long timespan across which these cases took place enables an assessment of how legal changes have affected the behavior of the regulated.

As for the features of the U.K. legal system, first, the United Kingdom has an advanced, sophisticated, and highly codified tax system. Second, the United Kingdom has operated a system of reliefs for movie productions for three decades, meaning that it is well understood by scholars and tax professionals. Third, the United Kingdom has made extensive use of legal measures to combat abusive tax practices, including Disclosure of Tax Avoidance Schemes (DOTAS) and a General Anti-Abuse Rule (GAAR). Finally, since similar tax reliefs and anti-abuse measures are adopted by other jurisdictions, an analysis of the United Kingdom might disclose interesting lessons for these jurisdictions.

B. Data Collection and Analysis

Data collection followed "theoretical sampling": the collection of data was a function of their conceptual analysis and continued in a circular process until theoretical saturation was

reached.[36] Essentially, the decision as to what data to collect was an iterative process informed by analysis of the first rounds of data collection and the ideas and categories that emerged therefrom. Open, axial, and selective coding supported by theoretical memos was used to interpret the data and produce concepts and categories.[37] Data analysis followed the three main stages of documental analysis: skimming, reading, and interpretation.[38] The skimming of official reports and media on tax avoidance schemes or fraudulent tax relief claims helped identify the main manifestations of such schemes and the relevant areas of regulation, as well as additional documental sources. With the second reading, open coding started: the data was broken down analytically and preliminary concepts and categories—especially, "juridical precipitators," "juridical excuses," and "juridical opportunities"—were identified. In the interpretative stage of analysis, these concepts and categories were first revised and integrated (axial coding). Next, they were unified into a theoretical framework around the core category of "juridical enablers" with two sub-categories of "general" and "special juridical enablers." (selective coding). Doctrinal methodology supported the analysis of legislation and case law.[39]

C. Limitations

The main limitation of this study is that it concerns only the U.K. jurisdiction and only specific schemes of tax abuse. However, the purpose of this study is to generate and generalize theory, not statistical frequencies.[40] The aim is not to demonstrate that any legal system has the exact same corrupting properties as the U.K. legal system or that these properties work in the same way for every form of crime or corrupt behaviors in every area of social life. Rather, the

[36] GLASER & STRAUSS, *supra* note 29; Corbin & Strauss, *supra* note 29.
[37] Juliet Corbin & Anselm Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, 13 QUALITATIVE SOCIO. 3, 12 (1990).
[38] Bowen, *supra* note 33, at 32.
[39] *See generally* Terry Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 DEAKIN L. REV. 83, 83 (2012) (discussing doctrinal legal research methods).
[40] YIN, *supra* note 30, at 10.

aim is to develop concepts and categories concerning general properties of tax law that can be used to assess other jurisdictions and other economic sectors. A further limitation concerns the exclusive use of document-based sources. While documental analysis is suited to the exploratory nature of this study and is complementary to ongoing research on the same topic, further empirical research on primary sources, such as surveys or interviews, would enable additional and more detailed findings—for instance, on the motivations of the offenders involved. Another constraint concerns the limited availability of public and academic legal databases of first instance decisions in criminal cases. Together with practical and temporal constraints, this prevented access to the more exhaustive description of the facts of the cases generally contained in such decisions. Although the facts were reconstructed through the use of alternative sources, such as news articles, press releases, and sentencing decisions, future research would benefit from accessing the full decisions.

III.
THE LAW AS A CRIMINOGENIC ENVIRONMENT: A THEORETICAL FRAMEWORK

This study is founded on three main theoretical premises, each supported by a different set of criminological or legal theories. First, that crime results from the interaction between motivation—including rationalization patterns—and opportunity. Second, that situations can be criminogenic either by providing opportunities for crime or by strengthening criminal motivations. Third, that the law can unintentionally enable criminal opportunities or strengthen criminal motivations. The theories behind these three premises will provide the fundamental concepts and categories to frame the comparative analysis of the U.K. case studies and the correlations between the legal system and the proximate—environmental and situational—causes of systemic tax abuse. This study will not directly address the correlations between the legal system and the remote, or root, causes of tax abuse—that is, factors related to broader

social and cultural developments—although the analysis will incidentally engage some of these correlations.

A. The Legal System as a Criminogenic Environment

Several environmental criminology theories, such as routine activity or rational choice, explain that crime depends on the interactions between motivations and opportunities. Motivations are individual drives to engage in corrupt behaviors. Opportunities are situations that make certain behaviors possible or more tempting. Cressey's fraud triangle, which has been used effectively to explain tax evasion and avoidance,[41] identifies rationalization as an additional cause of crime.[42] Rationalization is any mental construction of criminal behavior that neutralizes its moral and cognitive dissonances.[43] It is not an after-the-fact justification, but takes place before the act is committed and therefore reinforces the motivation[44] of potential offenders while helping them maintain a positive conception of self.[45] Rationalization could, therefore, be considered a component of the motivational process, but there are benefits to addressing it separately. Significantly, patterns of rationalization often include the neutralization of social and legal norms: for instance, denial of responsibility ("everybody does it" or "I had no choice"), denial of the victim ("they should have read the contract"), denial of illegality ("but it's legal" or "if it is not prohibited by law, then it is permitted") or the denial of legitimacy of law and legal authorities ("the law is unfair" or "the authorities are all

[41] Lederman, *supra* note 25, at 1182.
[42] *See generally* DONALD R. CRESSEY, OTHER PEOPLE'S MONEY (1953) (introducing his famous fraud triangle theory).
[43] *See generally* Gresham K. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22(6) AM. SOCIO. REV. 664, 664 (1957) (discussing various rationalization patterns); Michael L. Benson, Denying the Guilty Mind: Accounting for Involvement in White–Collar Crime, 23 CRIMINOLOGY 583, 583 (1985) (focusing on the techniques used by white-collar offenders to deny criminality).
[44] James W. Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93(2) AMERICAN J. SOCIO. 406, 411 (1987).
[45] DAVID MATZA, DELINQUENCY AND DRIFT 69 (1964); Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self–concept Maintenance*, 45 J. MARKETING RSCH. 633, 633 (2008) (for a psychological account of rationalization).

corrupt").[46] A specific focus on rationalization is particularly helpful in assessing how legal norms and institutions can prompt patterns of rationalization and can facilitate the identification of appropriate solutions. Situational prevention similarly embraces techniques to remove excuses.[47]

Opportunity, motivation, and rationalization can be generated or aggravated by the immediate environment of an individual including not only places and buildings, but also legal and social institutions.[48] Studies in law, criminology, and sociology confirm that legislation can inadvertently produce opportunities or strengthen motivations for crime[49] or other corrupt practices.[50] Other studies suggest that it is not just legislation that can have unintended corrupting effects but that the entire legal system, including lawmaking, law design, enforcement, and the interactions of these different elements can enable systemic corrupt practices, including tax avoidance.[51] According to such studies, these corrupting effects are not only the result of pathological elements and defective law design, such as regulatory capture[52] or poor enforcement. They are also the product of legitimate policy decisions reflected in substantive legal prescriptions or prohibitions—often specifically intended to contrast criminal or corrupt behaviors[53]—that may prompt creative adaptations to circumvent them.[54] Taken together, this literature suggests that the elements of the legal system that are liable to interact with the causes of tax abuse can be summarized in the following categories: lawmaking and

[46] Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Research in Organizational Behavior 1, 15 (2003); JANICE GOLDSTRAW-WHITE, WHITE-COLLAR CRIME: ACCOUNTS OF OFFENDING BEHAVIOUR 51-186 (2012).
[47] Clarke, *supra* note 20, at 292.
[48] Martin A. Andresen, *The Place of Environmental Criminology within Criminological Thought*, *in* CLASSICS IN ENVIRONMENTAL CRIMINOLOGY 5, 7 (Martin A. Andresen, Paul J. Brantingham & J. Bryan Kinney eds., 2010).
[49] *See* McBarnet *supra* notes 11, at 113 and Hock *supra* 12, at X.
[50] *See generally* Pasculli, *supra* note 24 (reviewing literature on this topic and analysing two case studies).
[51] *See* McBarnet, *supra* note 11, at 115 (noting the wide variety of legal factors that can enable tax avoidance).
[52] Ostas, *supra* note 23, at X.
[53] Dan Jasinski & Nicholas Ryder, *Regulating the Consumer Credit Market – Protecting Vulnerable Consumers*, *in* VULNERABLE CONSUMERS AND THE LAW 85 (Christine Riefa & Séverine Saintier eds., 2020); Pasculli, *The Responsibilization Paradox*, *supra* note 24, at 2114 and following.
[54] Peter N. Grabosky, *Counterproductive Regulation*, 23 INT'L J. SOC. L. 347, 349 (1995).

policymaking—as reflected in legal norms; law design; law enforcement; and interactions between different components of the legal system. Sidebottom and Tilley suggest seven ways in which systems can be criminogenic: furnishing rewards for crime through incentives for criminal behavior; making crime easy by providing instruments for offending; making crime less risky; facilitating crime planning by providing predictable patterns; disinhibiting and provoking crime; generating need that in turn facilitates crime; creating crime networks; teaching crime; and legitimatizing crime—particularly through routine non-enforcement of rules that lead to perceived illegitimacy.[55]

B. Interactions Between Legal Environments And The Causes of Tax Abuse

Criminal motivations, especially of economic crime,[56] are rarely innate, but often depend on environmental conditions that make certain goals and activities desirable. According to rational choice theory[57], immediate environments can help potential offenders decide whether or not to commit a previously contemplated crime or actively induce individuals to engage in misconduct they might not have otherwise contemplated.[58] Wortley calls any aspect of the immediate environment that triggers or intensifies criminal motivations a "situational precipitator" of crime.[59] Common examples applicable to tax offending include personal financial difficulties or corporate pressures to achieve business targets. Legal provisions can act as situational precipitators of crime too, especially with respect to tax offending. Given taxpayers are generally motivated to pay as little tax as possible, the statutory introduction of new taxes—a legitimate policy decision—is likely to provoke creative conduct by those seeking to circumvent them, either through deception or through inventive applications of the

[55] Sidebottom & Tilley, *supra* note 18, at 268-270.
[56] James W. Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOCIOLOGY 406, 409 (1987).
[57] *See generally* Derek Cornish & Ronald V. Clarke (eds.), The Reasoning Criminal: Rational Choice Perspectives on Offending (1986)(for an overview of rational choice perspectives on crime).
[58] Richard Wortley, *Situational Precipitators of Crime, in* ENV. CRIMINOLOGY & CRIME ANALYSIS 62, 63 (Richard Wortley & Michael Townsley eds., 2017).
[59] Id.

law. Similarly, the statutory introduction of tax reliefs, deductions, concessions, and exemptions—also entirely legitimate—can provoke attempts to exploit such benefits through abusive or dishonest behaviors. Accordingly, criminologists consider statutory provisions introducing either taxes or tax concessions as typical indicators of legislative crime risk.[60] The influence of law on criminal or corrupt motivations extends beyond criminogenic provisions. Enforcement also plays a crucial role. Failure to police, detect and punish early violations may strengthen motivation to reoffend, in a process of experiential learning.[61] Learning can be also mutual: potential offenders learn from the experiences of previous offenders. This experiential learning is crucial to the systematization of misconduct.

Opportunities also depend on environmental and situational conditions, including the absence of guardians capable of preventing criminal violations or the presence of circumstances that make targets vulnerable or accessible.[62] For tax abuse, opportunities are particularly related to the legal environment. Tax reliefs act both as motivators and targets of abusive schemes designed to exploit them. Legal structures and institutions can be the instruments to access these targets. Asymmetries in the tax regimes of different jurisdictions can also enable tax abuse.[63] Design and enforcement can also affect the presence of capable guardians—including not only the police, the judiciary or tax authorities, but anyone who could detect and report inappropriate tax practices.[64] For example, the absence of third-party reporting and withholding obligations on certain sources of income gives taxpayers the

[60] Russell Morgan & Ronald V. Clarke, *Legislation and Unintended Consequences for Crime*, 12 EUR. J. ON CRIM. POL'Y & RSCH, nos. 3–4, 189, at 192 (2006).
[61] Lederman, *supra* note 25, at 1166.
[62] Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, 44 AM. SOC. REV., no. 4, 588, 588 (1979).
[63] Morgan & Clarke, *supra* note 60, at 195.
[64] *See* Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 536 (2018) (studying the leaks that led US authorities to investigate tax evasion and design new tax laws).

opportunity to underreport their income and makes it more difficult for the government to verify information provided in taxpayers' returns.[65]

Rationalization patterns can also be triggered or reinforced by legal situations that legitimize or excuse criminal behaviors. Psychological theories of legitimacy maintain that people are less likely to obey the law and authorities if they believe these are unfair and ineffective.[66] The "overwhelming" rationalization behind the evasion of individual income tax is the "lack of equity" in the tax system, as manifested in uneven tax burdens, government fiscal irresponsibility, and lack of enforcement.[67] Taxpayers may rationalize that they are compensating for tax breaks that others secure, that government profligacy justifies cheating on tax payments, and that the lack of enforcement of the tax laws places an unfair burden on honest taxpayers.[68] These findings might not apply to tax avoidance, especially by wealthy individuals or companies, but the role that law plays in fostering rationalizations is broadly relevant. Loopholes, ambiguous provisions, and legal structures open to abuse may support the notion that their exploitation for private interests does not violate the law. An empirical study suggests that features of the law such as a blurred distinction between legal and illegal practices or excessive regulation can facilitate the rationalization of behaviors that, while not necessarily criminal, are still harmful for society.[69]

IV

TAX ABUSE IN THE U.K. FILM INDUSTRY

[65] Lederman, *supra* note 25, at 1188.
[66] *See generally* Jonathan Jackson et al., Corruption and Police Legitimacy in Lahore, Pakistan, 54 BRIT. J. CRIMINOLOGY 1067, 1067 (2014); Jonathan Jackson et al., Why do People Comply with the Law. Legitimacy and the Influence of Legal Institutions, 52 BRIT. J. CRIMINOLOGY 105, 105 (2012); Tom R. Tyler, Trust and Law Abidingness: A Proactive Model of Social Regulation, 81 B.U. L. REV. 361, 361 (2001); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (all examining the relationships between compliance and perceptions of the law and legal institutions).
[67] James A. Tackett, Joe Antenucci & Fran Wolf, *A Criminological Perspective of Tax Evasion*, 110 TAX NOTES 654, 656 (2006).
[68] *Id.*, at 655.
[69] Susanne Karstedt & Stephen Farrall, *The Moral Economy of Everyday Crime: Markets, Consumers and Citizens*, 46 BRIT. J. CRIMINOLOGY 1011, 1013 (2006).

A. Overview of Tax Reliefs For Film Productions

Tax reliefs are one significant way for the state to subsidize industry. An individual's or company's taxable income equals total taxable receipts during the tax period less all allowable deductions. Where deductible expenditures exceed taxable income for that period, the individual or company in question will generate a loss for tax purposes. The computation of taxable profits, losses, and allowable deductions follows certain basic rules common to most systems of taxation. First, as a general rule, income and capital are treated separately. A business may not reduce its taxable income by deducting capital expenditures from income. The most notable U.K. exception to this rule can be found in the scheme of capital allowances provided for by the Capital Allowances Act 2001—further exceptions to this general rule have been provided for film tax relief. Second, deductible expenditures must be incurred wholly and exclusively for the purposes of the trade being pursued by the business.[70] This is the so-called "no duality of purpose" rule. Not only must expenditures have been incurred for the purposes of the trade, they must not have been incurred for any other purpose as well.[71] Third, expenditures and losses may only be deducted from income if they are incurred in the course of the trade pursued by that business or of some connected trade.[72] A lawyer who runs a bakery business on the side may not deduct bakery losses from their income as a lawyer.

These general rules arguably place businesses producing films at something of a disadvantage because film production does not follow a typical business investment pattern. A conventional business would involve an investment followed by initial losses then relatively steady growth, and then perhaps another round of further investment. In contrast, film production requires a significant initial expenditure—often in the form of capital—with little or no income during production. A sudden surge in profitability occurs in the year of release,

[70] Corporation Tax Act 2009, §54(1) (Eng.); Income Tax (Trading and Other Income) Act 2005, §34(1) (Eng.).
[71] *See, most famously*, Mallalieu v. Drummond [1983] 57 TC 330.
[72] S51(2) Corporation Tax Act 2009; Income Tax (Trading and Other Income) Act 2005, §34(2) (Eng.).

followed by a quick drop to a fairly consistent level as the film is exploited in the years that follow. A conventional system of capital allowances often does not, therefore, adequately permit the write down of capital expenditures.

An initial relief for the development of film productions was provided by sections 40 to 48 of the Finance (No. 2) Act 1992 (FA1992). Under section 41, an immediate deduction for "preliminary expenditure" was provided for, while section 42 provided that the total production costs for large budget films could be deducted over a period of three years. These provisions were underpinned by sections 40A and 40B, which state that expenditures on film production should be regarded as revenue that is deductible against business income and not capital—a crucial point in several cases described below. These provisions were intended to improve the cash flow of film productions by allowing a quicker write down for development costs. Largely intended to offset a perceived disadvantage experienced by film productions, the reliefs that followed were designed to do more by providing incentives for the production of films in the United Kingdom. Following a recommendation by the Advisory Committee on Film Finance,[73] the Finance (No. 2) Act 1997 introduced an incentive scheme for film productions including a 100% write down (deduction) for production costs of films with total production expenditures of less than £15 million.[74]

The design of these reliefs created a number of methods for gaining an unintended tax advantage. These 1992 and 1997 reliefs ostensibly worked on a deferral basis, with tax reliefs being brought forward to create a trading loss in earlier years, offset by higher taxation later. One common method was for film producers to form a partnership, with tax being relieved sideways, such that when a new production began tax relief was claimed against the earnings from the previous production, allowing the producer of the previous film to exit the partnership

[73] Advisory Committee on Film Finance, Report to the Secretary of State for National Heritage (1996).
[74] Finance (No. 2) Act 1997, §48(2) (Eng.).

having paid a substantially lower rate of tax than they otherwise would have. Sideways loss relief is a common feature of most tax systems, and it was a key aspect of a number of the cases discussed below.

The Finance Act 2006 replaced the previous reliefs and sought to expand relief for film productions while simultaneously mitigating against potential tax avoidance schemes. The current regime for film productions tax allowances, found in Part 15 of the Corporation Tax Act 2009 (CTA), is generous for those film production companies that qualify. The Act distinguishes between film production activities and core activities. Section 1183 of the CTA provides that film production activities are "the activities involved in development, pre-production, principal photography and post-production of the film." Under section 1184 CTA, however, core expenditures only include pre-production, principal photography and post-production, and do not include development. Film production companies can claim a cash rebate amounting to 25% of the production's core expenditures if they were incurred in the United Kingdom.

Sector-specific relief for film production companies exists in addition to any other relief available under the Income and Corporation Taxes Act 1988 (ICTA 1988). Enterprise Investment Scheme (EIS) relief permits individual investors to deduct share purchases from (relatively) young companies in certain sectors.[75] The Finance Act 2021 introduced a so-called "super-deduction" for qualifying business investment, permitting undertakings to write-down qualifying investments at 130% of their value.[76] Certain companies can write down research and development costs at up to 230% of their value under section 1055 CTA. More broadly, still, the United Kingdom's system of capital allowances offers varying levels of write-down depending upon the nature of the asset.

[75] Income Tax Act 2007, §156–158 (Eng.) (The Seed Enterprise Investment Scheme provided for by Part 5A of the 2007 Act offers more limited relief, primarily for investment by venture capital funds).
[76] Finance Act 2021, §9 (Eng.).

Some differences in tax treatment reflect differences in the nature of particular investments. A business can typically expect a building to last longer than software or a machine. Other differences, however, are designed to change taxpayer behavior by encouraging investment in sectors or assets deemed particularly worthy. However, in addition to incentivizing these behaviors, special tax rules provide opportunities for behavior and investment that the rules did not intend to favor. As illustrated in the cases below, taxpayers may try to secure unintended tax benefits by embracing questionable interpretations as to how the reliefs are intended to apply. In other instances, preferable tax treatment might also be sought by outright deceit.

B. Overview of Selected Cases

1. Avoidance Cases

a. Eclipse 35

Eclipse 35 was a limited liability partnership, with 289 members, financed almost entirely by a twenty-year loan from a financial services provider. The partnership acquired a twenty-year license to two films from one Disney subsidiary, and then immediately sub-licensed those rights back to another subsidiary of the Disney Group. The partnership then made a loan to its members—in effect an advance on expected profits—with this loan being used to pre-pay the first ten years' interest due on the loan. The members then sought relief under section 362(1) of ICTA1988, which allowed taxpayers to deduct interest payments on loans used to buy into a partnership from their receipts—income—from that same partnership. The trick in this case was to convert what ought to have been passive investment income into purported trading income, thereby permitting that deduction. Critical to this result was the assertion that Eclipse was a trading partnership. Notwithstanding the Tribunal's refusal to characterize the transactions—in particular the immediate grant of a sub-license—as a sham,

the Tribunal concluded that Eclipse was not a trading partnership.[77] Both the Upper Tribunal and the Court of Appeal upheld this decision.[78] It is worth noting that sections 399–340 of the Income Tax Act 2007 (ITA2007) limit the amount of interest that can be relieved for loans to enter into film partnerships to 40%.

b. Ingenious

An example of the use of an Enterprise Investment Scheme (EIS), and arguably the highest profile one, involved the production of blockbusters such as *Avatar*, *Life of Pi*, and *The Best Exotic Marigold Hotel*. The case is also notable for the scale of the tax allegedly avoided—more than £1.6 billion—[79]as well as for the sheer complexity of both the business and contractual structures devised by the parties and the court decisions. Investment firm Ingenious used limited liability partnerships with a corporate member, as well as licensing arrangements for the distribution of films. The result was that individual investors in these partnerships did not have to recoup any losses before making a post-tax profit. The controversial issues were whether or not the partnership was trading, similar to the *Eclipse* case, and whether the deduction claimed by one of the LLPs was incurred wholly and exclusively for the purposes of the partnership's trade. The First Tier Tribunal (FTT) sided resolutely with HMRC. The FTT concluded that two of the three LLPs were trading but that the rights acquired by the LLPs were capital in nature, thus income from those investments was not the result of a trade. Consequently, revenue expenditure—business expenses—could not be set-off against investment income. The result of this decision was that 97% and 96% of two of the LLPs' losses could not be deducted and that absolutely none of the third LLP's losses could be deducted as it was not trading.[80] Following a successful appeal by HMRC to the Upper Tribunal

[77] Eclipse Film Partners No 35 LLP v. HMRC [2012] UKFTT 270 (TC).
[78] Eclipse Film Partners No 35 LLP v. HMRC [2013] UKUT 0639 (TCC); Eclipse Film Partners No 35 LLP v. HMRC [2015] EWCA Civ 95.
[79] Ingenious Games LLP & Ors v. HMRC, *supra* note 7, at 9.
[80] Ingenious Games LLP, Inside Track Productions LLP, Ingenious Film Partners LLP v. HMRC, *supra* note 7, at 1270–73.

(UT), in which none of the LLPs were deemed to be trading,[81] the FTT's decision was restored by the Court of Appeal.[82]

c. Icebreaker

This is, in reality, two cases. The first concerns Icebreaker LLP, which sought to manufacture trading losses so that the individual partners in the scheme would benefit from sideways loss relief. Icebreaker LLP entered into agreements with corporate partners, for the purposes of film licensing, distribution, and administration. Icebreaker sought loss relief for payments made to these corporate partners in accordance with section 40A FA1992, which provides that film production expenses are to be regarded as revenue costs—business expenses. The main issue concerned whether a number of these payments were made wholly and exclusively for the purpose of the film production trade. Both the FTT and the UT, highlighting the "glaringly obvious tax motive"[83] for most of these payments amounting to £1,064,000 concluded that there was no trade purpose for them, thus disallowing deductions and the corresponding loss relief.[84]

The related case,[85] concerning sideways loss relief claims of seven individual partners of the *Icebreaker* partnerships, raised three issues: (1) whether there was a commercial basis for the individuals' membership in the partnership; (2) whether or not the partners were non-active partners who, under section 118ZE ICTA1988 are not entitled to avail themselves of sideways loss relief;[86] and (3) in respect to one of the partners, whether the anti-avoidance rule under section 74ZA ITA2007 applies—barring both sideways relief and capital gains relief for losses arising in consequence of "relevant tax avoidance arrangements," those in which "the main purpose, or one of the main purposes, . . . is the obtaining of a reduction in tax liability by

[81] Ingenious Games LLP v. Revenue and Customs Commissioners, *supra* note 7, at 265–66.
[82] Ingenious Games LLP & Ors v. HMRC, *supra* note 7, at 169
[83] Icebreaker 1 LLP v. HMRC [2010] UKUT 477 (TCC), at 37.
[84] Icebreaker 1 LLP v. HMRC [2010] UKFTT 6 (TC), at 136.
[85] Acornwood LLP v. HMRC [2014] UKFTT 416 (TC); Seven Individuals v. HMRC [2017] UKUT 132 (TCC).
[86] Now to be found in s.103B ITA2007.

means of sideways relief or capital gains relief." The Tribunal concluded that a commercial basis must include a view to making a profit,[87] and an analysis of one of the projects of the partnership demonstrated that without the intended tax advantage there was little prospect of ever recovering the partners' capital, let alone a return on them. For the non-active partner question, the FTT concluded that although partners may well have spent a sufficient amount of time undertaking "research" activities such as "listening to music, reading periodicals and attending sports events or concerts," these "were unfocussed and of questionable utility, which not only did not advance the trade of any partnership but had no realistic prospect of ever doing so."[88] In considering whether the no duality of purpose test applied,[89] the Upper Tribunal concluded that "[t]he critical finding here is that the individual referrers spent the time because they had been told they must, and not in the expectation or hope that anything useful might come of them."[90] Finally, the case is an early example of the application of an anti-avoidance rule to such cases. The FTT stated, on the question of whether the main purpose of one of the partners was to obtain sideways loss relief, that:

> the aim was to secure sideways relief for the members, and to inflate the scale of the relief by unnecessary borrowing, coupled with the illusion that the borrowed money was available for use in the exploitation of intellectual property rights by the device of the purported payment of a large production fee offset by the equally purported payment of a fee for a share of the resulting revenue.[91]

Ultimately, the FTT concluded as a matter of fact that the taxpayer not only knew that the investment was not prudent absent the intended tax relief but that the sideways loss relief was his primary motive.

2. Evasion cases

[87] *See* Wannell v. Rothwell [1996] STC 450, at 6, 9–10 (discussing how the taxpayer's own trade was not done with a view to profit).
[88] Acornwood LLP v. HMRC, *supra* note 85, at 460.
[89] *Supra* notes 70 and 71.
[90] Seven Individuals v. HMRC, *supra* note 85, at 36.
[91] Acornwood LLP v. HMRC, *supra* note 85=6, at 506.

a. Animation[92]

Between 2007 and 2011, four individuals secured more than £5 million in VAT repayments and film tax relief through fraudulent claims for films that either didn't exist or with which they were not involved. Both the subject of fraud—that is the targets—and the instruments of the fraud were provided by the legal system. The targets were VAT and film tax reliefs. The instruments to attack both targets were more than twenty film-industry companies, such as Animation Film Company Limited, many of which were established solely for that purpose. The companies were used to give the appearance of legitimate film production activities and this deception was supported by further ruses, such as false invoices, film scripts, shooting schedules, crew and cast lists, detailed budgets, contracts with writers and producers, rented offices complete with letterheads and business cards, as well as Internet press releases announcing the production of movies, such as *Billy the Beagle*, that were never to be made, or stealing the details of movies, such as *London Dreams* that were in fact made by other companies. The offenders were convicted by Croydon Crown Court for cheating the public revenue in July 2013.

b. Little Wings Films

Accountant Keith Hayley and London-based financial advisers Robert Bevan and Anthony Charles Savill created and marketed Little Wing Films as a film development venture. They promised investors that for every £100,000 invested, higher rate taxpayers would receive £130,000 in tax repayments from HMRC.[93] More than 275 investors, including football players, investment bankers, and pop stars together deposited more than £76 million in the scheme believing they were helping the British film industry and legitimately reducing their tax bill. The primary promoters and participants falsified invoices and returns to inflate losses

[92] R (Anand) v. HMRC [2012] EWHC 2989, 2 (Admin).
[93] *Film Fraudsters Jailed for 27 Years in £100 Million Tax Avoidance Scam*, HM MAJESTY REV. & CUSTOMS (June 24, 2016), https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/film-fraudsters-jailed-for-27-years-in-ps100-million-tax-avoidance-scam-1454373.

and enable investors to collectively claim approximately £100m in tax repayments. Norman Leighton, an accountant and corporate services provider based in Monaco, helped the trio create the pretense that more than £250m was being spent on the pre-production and development of film packages in Monaco. In fact, these film packages had been created in London offices and cost only £4m. Then, to hide their fraud, the group established several offshore companies in the British Virgin Islands that supposedly operated in Monaco, Geneva, and the Channel Islands. These companies, which were in-turn fronted by family friends in the Philippines and Kolkata, repeatedly passed investor funds through their bank accounts to give the appearance that more money had been invested than true and thus inflated losses. The four men were sentenced to a total of 29 years after being found guilty of cheating the Public Revenue at Birmingham Crown Court in July 2016.

c. Zodiac and Aquarius

A similar scheme was organized and managed by Monaco-based accountant Terence Potter assisted by independent financial adviser, Neil Williams-Denton.[94] Starting in 2004, the duo used numerous LLPs (Zodiac 1, Zodiac 2, and Aquarius 1 to 12) to attract investments from potential partners, including high-earning investment bankers, by promising tax savings through taking advantage of sideways loss relief available under sections 380 and 381 ICTA1988. To shelter income of £1 million, a partner had to invest £300,000. A further £700,000 was borrowed by the partnership and together that generated tax relief of 40% of £1m or £400,000. The strategy was that the partnership would spend the £1m in the first year of trading thus incurring a trading loss of the same amount. This loss would be then attributable to the relevant partner, who could set it off against £1m of their other income. If that income

[94] *Film Tax Scheme Fraudsters Jailed for More Than 36 Years*, HM REV. & CUSTOMS (July 1, 2016), https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/film-tax-scheme-fraudsters-jailed-for-more-than-36-years-1463691; Vincent James Walsh v. Greystone Financial Ltd., [2019] EWHC 1719 (Ch).

had been taxed at 40%, it would therefore lead to a reduction in taxable income of £1m, and a repayment of £400,000.[95]

There are two fraudulent elements to this scheme. First, the partnerships claimed to have spent £5.7 million and had significant financial losses on two U.K. film projects, "Starsuckers" and "Mercedes the Movie." This would have enabled the investors to claim back approximately £40,000 in tax relief for every £20,000 they had invested. However, these claims were based on false or inflated invoices and fake records and diary entries produced with the complicity of filmmakers Christopher Walsh-Atkins and Christina Slater.[96]

A second fraudulent element was prompted by a change in the law. When the scheme was designed, the law allowed investors to claim sideways loss relief in excess of their investments, which they did for some financial years.[97] However, in an attempt to prevent abuse, the Finance Act 2004 (FA2004) had introduced restrictions[98] on the availability of sideways loss relief for non-active partners for the later financial tax years.[99] According to the new provisions, partners who did not devote "an average of at least ten hours a week" to the trade could not claim sideways loss relief in an amount greater than their contribution to that trade.[100] In response to this change, the financial advisers of some investors developed new partnerships and false records to create the pretense that investors were involved in film production activities for the

[95] Walsh v. Greystone, *supra* note 94, at 15.
[96] R v. Christopher Walsh-Atkins and Christina Slater, Sentencing, Southwark Crown Court (July 1, 2016), https://www.judiciary.uk/wp-content/uploads/2016/07/r-v-walsh-atkins-and-slater.pdf; *It's A Wrap for Film Tax Fraudsters Ordered to Pay Back £2m*, HM REV. & CUSTOMS (June 30, 2017), https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/its-a-wrap-for-film-tax-fraudsters-ordered-to-pay-back-ps2m-2044238.
[97] Walsh v. Greystone, *supra* note 5, at 14–22.
[98] Income and Corporation Taxes Act 1988, c.1, s.380 (UK), https://www.legislation.gov.uk/ukpga/1988/1/section/380.
[99] *See* Finance Act 2004, c.12, S.124 (UK), https://www.legislation.gov.uk/ukpga/2004/12/section/124/2004-07-22 (inserting new ss.118ZE–118ZK of the ICTA 1988) (describing loss relief for non-active partners).
[100] Income and Corporation Taxes Act 1988, c.1, S.118ZE(3)(b) (UK), https://www.legislation.gov.uk/ukpga/1988/1/section/118ZE.

required amount of hours a week, when they were not.[101] Terence Potter, Neil Williams-Denton, Christopher Walsh-Atkins, Christina Slater, and other investors were sentenced at Southwark Crown Court for conspiracy to cheat the public revenue.[102] Other investors were acquitted as they claimed the false records were prepared for them by the financial advisers.[103]

V

THE JURIDICAL ENABLERS FOR TAX ABUSE IN THE U.K. LEGAL SYSTEM

Even a preliminary review of the U.K. cases suggests that the legal system generated criminogenic situations that enabled or aggravated the causes of tax abuse. These situations can be defined as juridical enablers of tax abuse. The term "juridical" is preferable to "legal" because, as will be explained in this part, *every source of law* can have unintended corrupting effects, not just primary and secondary legislation, but also case law and enforcement practices. Juridical enablers can be distinguished into (a) juridical precipitators,when they create, trigger, or intensify motivations; (b) juridical excuses, when they provide or reinforce rationalization patterns;[104] and (c) juridical opportunities, when they provide access to targets, instruments or other conditions that make tax abuse easier or less risky. These categories are fundamental to assess the specific criminogenic effects of individual enablers. But it must be clear that the same juridical enabler can act at the same time as a precipitator, an excuse, and an opportunity. For this reason, this tripartite distinction is not ideal to frame the analysis of the U.K. case studies.

Juridical enablers of any kind can be further organized into two broader categories: general juridical enablers and special juridical enablers. General enablers are juridical precipitators,

[101] Walsh v. Greystone, *supra* note 94, at 39–52. *See also* Jane Croft, *City Traders Jailed in Film Tax Scam*, FIN. TIMES (Dec. 10, 2015), https://www.ft.com/content/cb6aea3a-9f50-11e5-8613-08e211ea5317 (describing the false records and overall scheme perpetrated by the individuals).
[102] Film Fraudsters Jailed for 27 Years in £100 Million Tax Avoidance Scam, supra note 93.
[103] Croft, *supra* note 101.
[104] This is in line with Wortley's definition of "situational precipitator." Wortley, *supra* note 58, at 58.

excuses, or opportunities for any possible form of tax abuse. They derive from general legal principles and basic conditions of the tax law system that inadvertently contribute to the development of a generic readiness to offend. These principles and conditions include especially the introduction of new or higher taxes, inadequate definitions and prohibitions of tax abuse, and ineffective or inefficient law enforcement. Special enablers are juridical precipitators, excuses or opportunities for specific abusive schemes, which also reinforce and specify motivations or rationalizations created or aggravated by general enablers. As such, they are usually embedded in legal frameworks concerning particular arrangements, such as the tax reliefs or business structures, that provide the main legal opportunities or instruments for certain abusive schemes.

The distinction between general and special enablers is broad and intuitive enough for it to serve as a clear and flexible framework for the analysis of the U.K. case studies. Moreover, the breadth of the distinction between general enablers and special enablers makes it particularly suited to assess the complex interactions between juridical precipitators, excuses, and opportunities. As the following analysis will show, it is not just isolated loopholes—such as an unclear or ambiguous statutory expression or judicial statement—that can enable tax abuse, but more often it is the combined effects of different components of the legal framework which, taken individually, might not present a problem. In these situations, which can be defined as "aggregated juridical enablers," the corrupting effects are not necessarily the result of inadequate policy decisions, law design, or enforcement, but rather of the natural "malleability" of the law—which makes it such a formidable instrument for the promotion of economic prosperity.[105] Such malleability derives not only from the openness of statutory and judicial language to multiple interpretations but also from the extraordinary capability of legal frameworks to be creatively assembled into structures that the legislature or the courts had

[105] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 213 (2019).

neither foreseen nor intended. It is worth noting that the correlations between general and special enablers and their aggregated effects tend to be less haphazard and, to an extent, easier to categorize and predict than criminogenic situations emerging in non-systematic environments.[106] This is because, unlike criminogenic factors in non-systematic environments, the law is organized in hierarchical and logical structures deliberately developed to influence individual behavior. As a result of this organization, it is possible to identify clear patterns that connect different sets of enablers to each of the three main stages of the offending process: (a) development of a readiness to offend; (b) rational assessment of opportunities; (c) perpetration of the offense.[107]

The next two parts will, therefore, follow the distinction between general and special enablers to facilitate the examination not only of individual juridical precipitators, excuses, and opportunities, but also of their mutual interactions and aggregated effects.

A. General Juridical Enablers: The General Tax Law Environment

1. Introduction of New Taxes and Changes to Tax Regimes

The first and most intuitive way in which the law can motivate tax abuse is by introducing taxes or increasing tax rates.[108] The deprivation imposed by taxation is bound to prompt attempts to minimize it, legitimate or otherwise. In this sense, every tax is vulnerable to avoidance or fraud[109] and tax saving is the common motive and reward for all evasion and avoidance schemes. The law thus acts as the primary juridical precipitator of tax abuse. A tax-saving motive, however, is not the same as a motivation to offend. The former concerns a

[106] *See* Sidebottom & Tilley, *supra* note 18, at 255 (introducing the different effects of systematic and unsystematic behaviors, respectively, on crime opportunities and motivations),
[107] *See* Wortley, *supra* note 58, at 9 (describing the different stages of the offending process).
[108] Morgan & Clarke, *supra* note 60, at 192–95. This is not an exclusive feature of tax law, for, as Morgan and Clarke observe, any other legislation introducing obligations or costs can provoke more or less legitimate attempts to avoid them.
[109] de la Feria (2020), *supra* note 5, at 243.

legitimate objective, common to all citizens, whereas the latter concerns the illegitimate means through which such objective is achieved. The introduction of taxes or increases in tax rates alone do not explain why some individuals respond by violating or abusing the law while others do not. Consequently, awareness of the logical dependence of a motivation to offend on the statutory provision of taxes has limited value in suggesting practical preventive solutions. Of course, some taxes might be perceived as unfair or excessively burdensome and motivate more abuse than would be expected, and lawmakers should consider these implications when introducing new taxes or reforming existing ones. Changes in tax regimes should be the subject of careful risk assessment, as they alter the status quo by creating additional pressure on the taxpayer, which can be met with resistance or defiance and provoke evasion or avoidance. For example, significant increases in tax levels have been found to contribute to an increase in smuggling in a number of jurisdictions.[110] Moreover, frequent changes in tax regime create a regulatory instability that can make compliance more difficult, as suggested by the discussions held during the VIRTEU national workshops.[111] However, the case studies considered here were not a reaction to new or increased taxes, but concerned pre-existing tax regimes, such as income tax or VAT. They show that the motivation to offend was precipitated by aggregated juridical enablers related to basic functioning and principles of the U.K. tax system and originating from various legal sources.

2. Inadequate Prohibition of Tax Avoidance Arrangements

One such aggregated enabler is legal uncertainty surrounding the prohibition of tax avoidance. During the period in which the film relief schemes examined here were initiated — 2002–2012—there was no general prohibition on tax avoidance in the United Kingdom.

[110] Morgan & Clarke, *supra* note 60, at 195.
[111] *See*, e.g., Marco di Siena, *VIRTEU National Workshop – Italy*, Session 1, video recording (April 29, 2021), at 18:50, www.corporatecrime.co.uk/virteu-national-workshop-italy (discussing how the tax system is particularly complex and unstable in the sense that it is subject to significant and often very proximate changes over a period of time and that these factors exert adverse effects on tax compliance).

Moreover, in the absence of a prohibition, courts reiterated the legal principle whereby individuals are entitled to use the law to minimize their tax liability in rather unequivocal and unattenuated terms[112] with no distinction between acceptable and unacceptable or aggressive avoidance.[113] This principle, which has been at the foundations of the tax system for over a century—intended to affirm the importance of law as a safeguard against state abuses—ended up becoming the cornerstone of the tax avoidance industry in the United Kingdom[114] by providing a legal basis both for rationalizations of abuses of the law and defense strategies against claims from authorities. These principles became not only juridical precipitators and excuses, but also juridical opportunities for tax abuse that made their perpetration less risky. These observations are consistent with findings of studies on the corrupting effects of the law in other areas—for example, financial regulation—which identified inadequate conduct regulation and the lack of clear prohibitions of harmful behaviors as one of the main enablers of systemic corruption.[115] Here, however, the enabler is not just the silence or ambiguity of written regulation but an explicit principle stated by the courts.

[112] *See*, IRC v. Duke of Westminster [1936] AC 1, at 19–20 (per Lord Tomlin: "Every man is entitled, if he can, to order his affairs so as that the tax attaching [...] is less [...]. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax;" Fisher's Executors v. Commissioner of Internal Revenue [1926] AC 395, at 412 per Lord Sumner: "My Lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability nor incurs blame."); Ayrshire Pullman Motor Services v. Inland Revenue (1929) 14 TC 754, at 764 (per Lord Clyde: "No man in the country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or property as to enable the Inland Revenue to put the largest possible shovel in his stores. The Inland Revenue is not slow, and quite rightly, to take every advantage which is open to it under the Taxing Statutes for the purposes of depleting the taxpayer's pocket. And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue.")

[113] ALLDRIDGE, *supra* note 4, at 29.

[114] *See* Judith Freedman, *United Kingdom*, *in* GAARS: A KEY ELEMENT OF TAX SYSTEMS IN THE POST-BEPS WORLD 741 (Michael Lang, et al. eds., 2016) (concluding that the courts' permissive approach to minimization of tax liability is a key element of tax avoidance).

[115] Nikos Passas, *Lawful but Awful: "Legal Corporate Crimes,"* 34 J. SOCIO-ECONOMICS 771, 774 (2005).

Subsequent decisions sought to correct the unintended outcomes of the old case law through a new approach[116] expressed by the *Ramsay* decision, which required that a series of transactions with inserted steps lacking commercial purpose other than the avoidance of tax be viewed as a whole and the respective tax be imposed on the basis of the overall result.[117] However, taxpayers soon began exploiting the wording of *Ramsay* as if it were a legislative rule arguing—often successfully—that the lack of any of its conditions prevented its application.[118] The precipitator of such exploitative interpretations is the *change* in the law: the introduction of a restrictive—in this case, judicial—regime can motivate individuals long accustomed to a more permissive one to react by trying to circumvent it and preserve the status quo ante. The juridical opportunity for such interpretations is the ambiguity and intrinsic malleability of the language used by courts.

Parliament sought to remedy this problem by introducing statutory anti-abuse rules to override case law. Such rules operate on the opportunity structure in two main ways. First, they seek to counteract patterns of rationalization through a statutory definition and prohibition of unacceptable forms of avoidance. Second, they seek to reduce rewards by removing any unlawful tax saving through consequential relieving adjustments.[119] Previously, Parliament introduced numerous specific anti-avoidance rules (SAARs), prohibiting specific avoidance arrangements, as well as targeted anti-avoidance rules (TAARs), which apply to specific taxes or tax areas. This approach and the design of these norms had limited deterrent and preventive effects and produced unintended consequences. There are more than 300 such rules—each worded slightly differently from the other and too broad to be helpful.[120] One example of

[116] Judith Freedman, Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament, 123 LQR 53, 56 (2007).
[117] W.T. Ramsay Ltd v. IRC [1982] AC 300.
[118] Freedman, *supra* notes 115 and 117.
[119] *Id*.
[120] *Id*.

TAAR is s74ZA Income Act 2007, which was applied in the *Icebreaker* case—for the latest tax years affected by the scheme. The scant definition of "relevant tax avoidance arrangements"[121] lent itself to self-interested interpretations whereby the tax-saving purpose should be assessed entirely subjectively, as the purpose of the taxpayer, rather than the purpose of the arrangements themselves. This interpretation fueled rationalizations of such schemes as legitimate, which—no matter how wishful—were used in both the first instance and the appeal trials to resist enforcement.[122]

Only in 2013—too late to be applied to any of the case studies examined here—did the U.K. Parliament introduce a general anti-abuse rule (GAAR).[123] GAAR applies independently from any SAAR or TAAR and can be used to counter schemes intended to avoid specific or targeted rules.[124] GAAR defines "abusive" tax arrangements" as arrangements that "cannot reasonably be regarded as a reasonable course of action" because their results are inconsistent with the principles or policy objectives governing the provisions abused, or because "the means" of achieving those results involves "contrived or abnormal steps", or because they are intended to "exploit any shortcomings" in those provisions.[125] In 2016, a penalty of 60% of the tax due was added to increase the deterrent effect of GAAR.[126] GAAR's definition of abusive avoidance is arguably more precise and exhaustive than the wording of many SAARs and TAARs, but it comes with its own problems. First, GAAR prohibits only abusive arrangements, leaving out non-abusive avoidance schemes, confirming that some tax avoidance is legal.[127] This is a legitimate policy decision, but it can support rationalizations and provide an

[121] s.74ZA ITA2007.
[122] Seven Individuals v. HMRC, *supra* note 87, at 93–115.
[123] Finance Act 2013, c. 29, Part 5, S.206 (UK), https://www.legislation.gov.uk/ukpga/2013/29/section/206.
[124] Freedman, *supra* note 116.
[125] Finance Act 2013, c. 29, Part 5, S.207 (UK), https://www.legislation.gov.uk/ukpga/2013/29/section/207.
[126] *Penalties for the General Anti-Abuse Rule*, HM REV. & CUSTOMS (Dec. 9, 2015), https://www.gov.uk/government/publications/penalties-for-the-general-anti-abuse-rule/penalties-for-the-general-anti-abuse-rule.
[127] Julie Cassidy, *GAAR Anti–avoidance vs GAAR Anti–abuse*, J. INT'L TAX'N 51, 51 (Sept. 2019).

opportunity to resist claims from HMRC. Second, although the test to establish the abusive nature and the main purpose of the arrangements is now clearly objective, the ambiguity of the double reasonableness test can provide opportunities for self-interested interpretations.[128] Finally, the introduction of the GAAR penalty can be counterproductive. By definition, arrangements counteracted by the GAAR are arrangements that, though egregious and abusive in nature, have not been defeated by the normal application of the law. Therefore, paradoxically, schemes that are more obviously against legislation might actually escape GAAR penalties.[129] The U.K. case studies illustrate the limited role of anti-avoidance rules in combatting outright fraud and deception. While the GAAR may have provided an additional deterrent in the avoidance cases, the SAAR for sideways loss relief was in force during the period of all the above avoidance cases and seemed to do little to dissuade taxpayers from taking a chance on such structures. With the sole exception of a single taxpayer in *Icebreaker*, it was the application of long-established rules concerning connected losses and duality of purpose that ultimately broke these schemes.

However, the corrupting effects of the exact wording of the law should not be overestimated. This wording might be important to professional advisers devising abusive schemes, but other individuals participating in such schemes as partners or accomplices may be unacquainted with, if not oblivious, to it. For them, generic awareness of the existence of a "grey area" between legal and illegal arrangements might be enough to rationalize even overtly criminal schemes. Evidence of this comes from statements by filmmaker Christopher Walsh-Atkins, who had provided false invoices to support the fraudulent *Zodiac* and *Aquarius* schemes architected by Terence Potter:

[128] *See also* Freedman *supra* note 115 (defining the test as a "triple reasonableness" test).
[129] Judith Freedman, *Finance Act 2016 Notes: Section 158: General Anti-Abuse Rule: Penalty*, 5 BRIT. TAX REV. 637, 638 (2016).

> He had a scheme that, on the face of it, could have been legal […] When I first looked at it, I thought, "This is right at the edge of the grey area, but it looked probably OK." Over the two years financing the film, the nature of what he was asking us to do changed over that time and got progressively more bent.[130]
>
> […] Potter flew me out to France and told me that he'd developed a new film-funding scheme. He admitted that he'd made 'a few modifications' to circumvent HMRC's latest restrictions. It was clearly moving towards the darker end of the grey area, but to me, the scheme didn't sound that different from what was happening more broadly in the film industry at the time. Bottom line, I should have been more concerned with checking out Potter's scheme, but I was desperate to get the film made. […] In retrospect, I realised it was wrong—possibly criminal—and I should have known better. However, Potter assured me it would not get us into trouble. I heard what I wanted to hear and quickly forgot about the funding, becoming consumed by what was an extremely ambitious production.[131]

3. Ineffective Enforcement

Publicly, HMRC unequivocally condemns tax abuse and portrays its enforcement as effective and inexorable[132] in an attempt to counter rationalization patterns and promote deterrence. However, the preventive effect of such signals can be frustrated if actions do not match the words. The ineffectiveness of enforcement action is a problem in many jurisdictions.

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[130] Charles Gant, *Filmmaker Chris Atkins talks about the UK film tax fraud that saw him sentenced to five years in prison*, SCREEN DAILY (Feb. 19, 2020), https://www.screendaily.com/features/filmmaker-chris-atkins-talks-about-the-uk-film-tax-fraud-that-saw-him-sentenced-to-five-years-in-prison/5147237.article.

[131] Chris Atkins, A Bit of a Stretch: The Diaries of a Prisoner, *Introduction* (2020).

[132] *See, e.g.*, *Film Fraudsters Jailed for 27 Years in £100 Million Tax Avoidance Scam*, *supra* note 96 ("After painstaking and complex work from our investigators, and a series of long trials, HMRC has dismantled the fraudulent operation, and shown that we have the intent and capability to bring criminals to justice regardless of their resources. The long sentences handed down send a powerful message to those tempted to deceive HMRC. Nobody is beyond our reach"); *Film Tax Scheme Fraudsters Jailed for More Than 36 Year*, *supra* note 95 ("The fraud was a deliberate attempt to steal from the taxpayer, as well as investors who now face hefty tax bills. These fraudsters were already wealthy individuals who thought they could get away with it – now they are paying the price behind bars. HMRC's investigators exposed this crime and demonstrated that we are determined and capable of tackling all types of tax fraud, regardless of the resources of those who commit it"); *General Anti-Abuse Rule (GAAR) Guidance (Approved by the GAAR Advisory Panel with Effect from 16 July 2021)*, HM REV. & CUSTOMS (July 16, 2021), https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules, at B2.2 ("Taxation is not to be treated as a game where taxpayers can indulge in inventive schemes in order to eliminate or reduce their tax liability"); *Corporate Report: Use of marketed tax avoidance schemes in the UK (2019 to 2020)*, HM REV. & CUSTOMS (Nov. 30, 2021), https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk-2019-to-2020 ("We are continuing our efforts to squeeze the hard core of promoters out of the market, adopting a two-pronged approach involving choking the demand for these schemes and disrupting their supply. We are doing this through a mixture of a targeted educational campaign to would-be users of avoidance schemes and tough enforcement action against promoters. […] Tax avoidance is not acceptable. It deprives our public services of the funding they need and it can leave those who get involved with big tax bills. HMRC has a vital role to play in stamping out tax avoidance. It is also important that taxpayers be wary about the arrangements they are being offered and steer clear of avoidance.")

The VIRTEU Expert Survey suggests that experts from various countries perceive the level of criminal sanctions as provided for by legislation to be "adequate," but they perceive the adequacy of the sanctions actually inflicted by the courts as barely "average" or bordering "inadequate."[133] Cost-benefit and efficiency considerations motivated by limited resources can lead to "selective" enforcement focused on maximizing revenue gains, rather than on the prosecution and punishment of the actual perpetrators.[134] Awareness of sparse controls can strengthen motivations of abuse and lower the perceptions of risk. This appears to have been the case for filmmaker Christopher Walsh-Akins—perpetrator of the *Zodiac* and *Aquarius* fraud. According to the sentencing judge, Atkins showed particular awareness of "how vulnerable [the system of film tax credits] was to dishonest exploitation."[135] The Times further reports that Atkins said that "he learnt how easy it was to obtain film tax credits after receiving £115,000 of taxpayers' money without any checks" to make his movie Taking Liberties.[136] In a private email to a journalist he is reported to have said: "I'm a known player who really should have been given a proper inquiry before they paid out. Eeejits."[137]

Enforcement can also be undermined by ambiguity as to the effects or meaning of legal provisions and, as a result, uncertainty on the legality of individual schemes. Legal uncertainty does not derive only from inadequate statutory provisions—such as the anti–avoidance rules examined earlier—but also from contradictory or unclear judicial interpretations—such as the above-mentioned *Ramsay* principle—[138]and from diverging opinions between courts and tax authorities. Such uncertainty can support rationalizations of specific schemes as legitimate and

[133] *See* Costantino Grasso & Stephen Holden, *VIRTEU Expert Survey Report: The Interconnections between Tax Crime and Corruption*, CORPORATE CRIME OBSERVATORY (Sept. 2022), at 20 and 21, available at: www.corporatecrime.co.uk/virteu-expert-survey.
[134] de la Feria (2020), *supra* note 25.
[135] R v. Christopher Walsh-Atkins and Christina Slater. Sentencing, *supra* note 7.
[136] Brown, *supra* note 3.
[137] Id. "Eejit" is a slang term derived from a dialectal spelling of the pronunciation of "idiot."
[138] *See* ALLDRIDGE, *supra* note 4, at 32 (discussing the uncertain application of the *Ramsay* principle); *see also* Freedman, *supra* note 116 (answering, "is Ramsay dead?").

provide opportunities and motivations to resist enforcement. More broadly, it can create the perception that the authorities or the law are incompetent or inefficient which, as suggested by legitimacy theory, can undermine compliance and institutional trust.[139]

A clear example of these mechanisms is provided by the *Ingenious* case. As illustrated above, the final outcome of the case was largely unfavorable to the architects of and participants in the avoidance scheme—as 96% to 97% of their losses were eventually disallowed by the Court of Appeal in the last instance trial—on the grounds they were capital and not income. However, the Court of Appeal confirmed the First Tier Tribunal's finding that the LLPs were "trading," rejecting HMRC's and Upper Tribunal's interpretation that they were not which would have led to disallowance of all losses. This comparatively minor achievement for Ingenious allowed the firm to trumpet it as a victory on their website and to use it to even deny that the schemes in question were tax avoidance schemes:

> Recent media reports relating to high-profile investors in Ingenious film partnerships have misrepresented the tax status of their investments and Ingenious' film business. These are not "tax avoidance schemes". This is not just Ingenious's view, it is also the judgment of the UK court. […] HMRC has tried to claim that certain partnerships that [utilized] government tax breaks designed to support the UK film industry were set up for the purpose of avoiding tax. However, a Tax Tribunal brought by Ingenious against HMRC to challenge this notion vindicated Ingenious's position and ruled that they were bona fide businesses run for a commercial profit and that Ingenious investors were putting their money into legitimate film investment vehicles. This stands in contrast to other film related tax cases that have been before the courts in recent years. The exact amount of tax relief that Ingenious investors are able to claim is still in dispute and Ingenious will continue to fight for its investors' interests.[140]

The statement relies on a popular notion of tax avoidance as something negative but is legally inaccurate. Tax avoidance is not always illegal and the judicial decision of the FTT did

[139] *See supra* note 66 (for a discussion of the relationship between trust, legitimacy and compliance).
[140] *Ingenious Responds to Misleading Reports About Investors Tax Affairs*, INGENIOUS (Feb. 11, 2017), https://www.theingeniousgroup.co.uk/article/ingenious-responds-to-misleading-reports-about-investors-tax-affairs/.

not take any position on the avoidance nature of Ingenious's arrangements. In fact, the courts recognized the tax saving motives of the participants of the schemes. The parts of the decisions that were unfavorable to Ingenious are not mentioned and Ingenious is presented as a defender of the investors' interests—thus, implicitly casting a negative light on HMRC. Press coverage tended to be more objective but still included headlines and statements that could easily support similar rationalizations.[141]

The complexity of judicial decisions can aggravate legal uncertainty. The *Ingenious* case before the FTT involved forty-seven days of hearings, and the judgement of the tribunal runs to 343 pages and 1826 paragraphs.[142] The UT decision took twenty-two hearings and runs to 159 pages and 634 paragraphs.[143] The judgment of the Court of Appeal is fifty-five pages and 169 paragraphs long.[144] The grand total reached 557 pages and 2629 paragraphs, a litigation that the Court of Appeal characterized as of "epic scale."[145] Although less monumental, the FTT decision in the *Eclipse* case was equally impressive, running to "96 closely printed pages and 417 paragraphs."[146] Such complexity may have various corrupting effects. First, longer decisions increase the risk of unintentionally producing unclear, confusing, and contradictory expressions and statements that can create genuine ambiguity in the system and act as both precipitators and opportunities for further abuse. Second, even when their wording is clear and unambiguous, the natural malleability of legal language makes these decisions powerful precipitators or opportunities for abuse, as they provide motivated offenders with a wealth of words and sentences that can support further rationalizations or the development of new

[141] See Macnab, supra note 6 (providing an example of headlines that might inadvertently support rationalization patterns); see also K.J. Yossman, 'Avatar' Film Funding Firm Backed by David Beckham, Sacha Baron Cohen Wins $975 Million Tax Avoidance Case Against HMRC, VARIETY (Aug. 5, 2021), https://variety.com/2021/biz/news/avatar-film-funding-ingenious-hmrc-david-beckham-1235035446/ (same).
[142] Ingenious Games LLP, Inside Track Productions LLP, Ingenious Film Partners LLP v. Her Majesty's Revenue & Customs (HMRC) [2016] UKFTT 0521 (TC),
[143] Ingenious Games LLP v. Revenue and Customs Commissioners [2019] UKUT 226 (TCC).
[144] Ingenious Games LLP & Ors v. HMRC [2021] EWCA Civ. 1180.
[145] *Id.*, at 17.
[146] Eclipse Film Partners No 35 LLP v. HMRC [2015] EWCA Civ 95, at 47.

schemes or strategies to resist enforcement. As the *Zodiac* and *Aquarius* case shows, motivated offenders do not necessarily rely on thorough legal analysis but can be selective in their reasonings—they hear what they want to hear. Finally, given these decisions are largely inaccessible to and impenetrable for the layperson, they might be unable to counteract rationalizations disseminated by perpetrators or the media.

B. Special Juridical Enablers

1. Availability of tax reliefs or concessions

If general juridical enablers produce or aggravate individual dispositions towards tax abuse in general, the introduction of tax reliefs or concessions acts as both an opportunity and a precipitator of specific abusive schemes. Tax reliefs provide a legitimate opportunity to achieve tax savings without the effort and risk of doing so through more overtly illegal means and promise a reward that motivate individuals to take advantage of such reliefs as much as possible. The legality of the relief, together with the above-mentioned lack of clear anti-abuse norms, helps rationalize abusive exploitations as legitimate. These corrupting effects depend not only on the regulatory design of such benefits or on the controls in place to monitor applications, as suggested by previous research,[147] but also on unexpected or unintended interactions of the regulation of such reliefs with other areas of law.

As for law design, three main factors emerge from the analysis of the law introducing tax reliefs in the U.K. case studies. The first is the already discussed lack of anti-avoidance provisions, which is now partly remedied by GAAR—albeit with the flaws highlighted above. The second is the inadequacy of the legal requirements for relief which make it available in situations that the legislature might have not envisaged or intended. A clear example is the provision of a sideways loss relief to "any person" who "sustains a loss in any trade, profession,

[147] Morgan & Clarke, *supra* note 60, at 189 and following.

vocation or employment carried on by him either solely or in partnership" under sections 380 and 381 ICTA 1988. These norms ignore that not all members of a partnership are necessarily active traders. Consequently, investors not actually involved in the trade of a partnership could join it only to take advantage of the relief, as it happened in the *Zodiac* and *Aquarius* case. A third corrupting factor is the later introduction of more restrictive requirements in response to abuse, which, like the introduction of new taxes or prohibitions, can motivate individuals who had benefitted from the old regime to find ways to circumvent the new requirements. In the *Zodiac* and *Aquarius* case, the later introduction of the requirement that partners need to be active to enjoy the relief motivated both non-active partners who had previously benefitted from the relief and their advisers to falsify records to create the pretense of the required activity. Thus, a legislative amendment intended to mitigate the risk of avoidance caused by the original legal design became a precipitator of fraud.

The regulation of tax relief does not exist in isolation. Its interpretation and application depend on the regulation of the industry sectors and the activities to which such reliefs apply. Consequently, uncertainty and ambiguity in such regulation can make tax reliefs vulnerable to abuses. Some of the reliefs claimed by LLPs in the case studies rely on notions defined by commercial law. Both statutory provisions regulating the tax relief for interest on loans claimed by Eclipse 35 LLP[148] and the sideways loss relief claimed by the Ingenious LLPs,[149] for instance, require taxpayers to carry on a trade. Furthermore, for LLPs to be treated as "transparent" for income tax purposes,[150] section 863(1) Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005) requires that they carry on a trade "with a view to profit."

[148] Income and Corporation Taxes Act 1988, c.1, S.362(1) (UK), https://www.legislation.gov.uk/ukpga/1988/1/section/362/enacted.

[149] Income and Corporation Taxes Act 1988, c.1, S.380 (UK), https://www.legislation.gov.uk/ukpga/1988/1/section/380, later replaced by Income Tax Act 2007, c. 3, S.64 (UK), https://www.legislation.gov.uk/ukpga/2007/3/contents.

[150] This means that anything done by, to or in relation to the LLP for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners. In the context of tax reliefs, transparency allows individual members of an LLP to claim loss relief for the LLPs' trading losses.

This expression repeats the language of section 1(1) of the Partnership Act 1890 which defines a partnership as "the relation which exists between persons carrying on business in common with a view of profit." Therefore, the notions of trade and with a view to profit were crucial to assess the entitlement of individual members of the LLPs to sideways loss relief. Neither notion is defined by statute, so courts in both cases had to turn to previous judicial decisions with problematic results.

Not only did this litigation produce extremely long and complex decisions, which lend themselves to abusive exploitations as noted above, but it also produced different results in the *Eclipse* and *Ingenious* cases. In *Eclipse*, the Court of Appeal eventually denied that the LLPs were carrying on trade, yet in *Ingenious* the Court stated they did. This is because *Eclipse* concerned the production of studio films for which most trading activities were carried out by Disney; Ingenious LLPs also concerned the production of independent films, but Ingenious LLPs had a more active role. This outcome can have two main corrupting effects. First, as observed earlier, the marginal victory of Ingenious can easily lead to rationalization patterns. Second, the comparison between the two cases could suggest new techniques to develop avoidance schemes relying on the *Ingenious* decision by expanding LLPs' investments to independent films hoping to satisfy the trade requirement. It is, therefore, not just the design of the regulation of tax reliefs that can have corrupting effects, but its interactions with other relevant regulation.

2. The legal instruments of tax abuse

Once the motivation of taking advantage, fraudulently or otherwise, of a tax relief, has developed, the next step is finding the means to do so. The main instruments of abuse in case studies examined were legal structures made available by company law and contract law. Multiple LLPs and extremely elaborate contractual arrangements involving numerous transactions were used to create legal relationships that could, at least formally, fulfill the

requirements of tax reliefs in tax avoidance cases or, in evasion cases, to support and conceal the parties' deceptions. These instruments make abuse possible, and also less risky, by weakening controls. The complexity of these arrangements crafted by tax advisers and the considerable volume of documents surrounding them is a serious obstacle to investigation and enforcement. For instance, the use of offshore companies is not only instrumental to the fictitious multiplication of transactions and inflation of losses, as in the *Little Wings* case, but also requires tax authorities to conduct investigations abroad. Another example is the complexity of documentary evidence in the *Eclipse* trial, which amounted to approximately one hundred lever arch files or ring binders.[151] The parties were unable to agree to a bundle[152] and the FTT decided that Eclipse should prepare it and the costs be shared. The bundle prepared by Eclipse's solicitors for the parties ran to over 700 lever-arch files. Eclipse's agents sent the Revenue invoices for a total of £108,395.48 (inclusive of VAT), representing only half the cost to Eclipse of preparing the bundles.

From a policy perspective, contracts and business structures are a fundamental instrument of economic life, and no loopholes or flaws in law design in these areas were exploited by perpetrators. However, these legal structures lend themselves to be creatively assembled into schemes that can circumvent prohibitions or prescriptions in other areas of law. This is another face of the malleability of law which here, unlike in other examples mentioned above, does not concern the natural ambivalence of legal language, but rather the very same flexibility and manipulability of private law.[153]

Judicial approaches to form, substance, and artificial transactions and business structures can also act as precipitators and opportunities for the development of artificial undertakings instrumental to tax abuses. Generally, the courts of England and Wales will only regard as

[151] Eclipse Film Partners No 35 LLP v. HMRC [2015] EWCA Civ 95, at 46.
[152] In the U.K. legal system this term designates a collection of documents relevant to a case in a court trial.
[153] PISTOR, *supra* note 105.

"sham" transactions those "which are intended by [their perpetrators] to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."[154] Similarly, the courts are reluctant to look beyond formal legal structures with respect to business entities. While muddled and inconsistent jurisprudence on piercing the corporate veil in cases of fraud and dishonesty dominated judicial discourse for much of the twentieth century, the decision of the U.K. Supreme Court in *Prest* has largely put an end to this uncertainty by confirming that the circumstances in which a court will lift or pierce the corporate veil are extremely limited.[155]

The use of legal business and contractual structures as instruments of tax abuse also contributes to making such abuse systemic by facilitating their socialization and institutionalization.[156] Business structures, except sole traders, and contracts are suited to develop and frame much more complex relationships between different individuals and entities. This means that they are particularly powerful instruments to create corrupt or abusive networks. This is in line with previous findings that systems create crime networks.[157] However, the use of legal systems to create such networks is more insidious and problematic than using other systems, because in many cases the participants in tax avoidance schemes are oblivious to their abusive nature. And even if they are aware of it, they can easily shield themselves behind the legal responsibilities of the tax advisers and professionals who developed the scheme. This can facilitate rationalizations in the form of denial of responsibility ("it's not my fault", "I didn't know") and can hinder enforcement because it might not be easy for authorities to demonstrate that all participants in the scheme had the required mental

[154] Snook v. London & West Riding Investments Ltd [1967] 1 All ER 518, 528.
[155] Prest v. Petrodel Res. Ltd. [2013] UKSC 34.

[157] Sidebottom & Tilley, *supra* note 18, at 269.

elements for the relevant offenses. Moreover, once schemes are developed, their contents, structures, and techniques remain in the public domain for others to replicate or develop into new schemes. The circle is closed when some of these schemes are wholly or partly condoned by unclear judicial decisions or otherwise ineffective enforcement, which contributes to establishing them as legitimate options to save taxes.

VI
RECOMMENDATIONS AND CONCLUSIONS

The U.K. case studies reveal some original findings which integrate previous research and can help identify possible solutions. First, the juridical enablers of tax abuse are not just individual legal situations—such as specific statutory provisions, judicial statements, or enforcement—but also include the aggregated effects of the interactions among multiple components of the legal environment. While some elements of the system might individually act as juridical precipitators, opportunities, or excuses for tax abuse, more often it is all of these factors at the same time. Any legal situation that creates uncertainty around the legality of specific activities can, at a minimum, act as an excuse for crime by supporting rationalization patterns. However, the combination of different elements of the legal system, that individually have little or no corrupting effect, can result in frameworks and structures which act as aggregated juridical enablers of tax abuse. Through such aggregation, legal frameworks and structures can often become powerful enablers not just of occasional abuses but of their systematization.

A recurring example common to all the case studies examined here is the aggregated corrupting effects of tax reliefs and otherwise perfectly legitimate business structures and contractual arrangements. The interactions and aggregation of different juridical enablers follow clear patterns reflecting the logical structures of the law. Basic conditions of the legal environment, such as general principles of tax law and enforcement, act as *general juridical*

enablers of tax abuse—mostly serving as preliminary precipitators and excuses. The introduction of tax reliefs and the availability of business and contract structures act as *special enablers* that provide the legal opportunities to achieve the reward of tax savings through specific abusive schemes and the legal instruments that make such schemes possible and less risky. Such patterns allow for a degree of predictability which should facilitate prevention. Situational measures to prevent tax abuse should sever the connections between different enablers to de-escalate the process that leads to the perpetration of the abuse.

Second, and closely related to the previous point, it is not merely legislation that can enable tax abuse. Every legal source, including case law, and their mutual interactions with each other, can have corrupting effects. Ambiguous or inadequate statutory provisions can not only act as enablers of specific avoidance or evasion schemes, but they can originate confusing or excessively complex judicial decisions or conflicting interpretations between courts and tax authorities that amplify the corrupting effects of legislation and produce new ones.

Third, it is not just the pathology of the law that can enable abuse, but also its physiology. Juridical enablers of tax abuse are not necessarily the product of defective policy, law design, or enforcement, but often they depend on intrinsic, and somewhat inevitable, properties of law such as the natural malleability of legal language and legal frameworks such as business structures and contractual transactions.[158] Moreover, the general, abstract, and durable nature of law multiplies the corrupting effects of juridical enablers across the regulated sectors and perpetuates them, facilitating their rationalization, socialization, and institutionalization.[159] This suggests that legal environments can not only produce criminogenic situations, but also aggravate deeper social causes of systemic corrupt practices, for instance by affecting social

[158] PISTOR, *supra* note 105, at 212.
[159] Pasculli, *The Responsibilization Paradox*, *supra* note 24, at 2122.

perceptions and cultural mindsets, thus acting as a link between proximate—situational and environmental—causes of tax abuse and remote ones.

Fourth, changes to the tax code are powerful enablers of tax abuse. Legal change has particularly strong effects on motivational processes. In line with previous research,[160] this study shows that the introduction of legal regimes that impose new costs on individuals, such as new or higher taxes, or restrict access to or availability of certain resources, such as new limitations on tax reliefs, can motivate individuals accustomed to the previous, more permissive regime, to circumvent the new norms. But even pro-taxpayer legal changes trigger this response. The introduction of tax reliefs, concessions, and other benefits acts as both a motivation and opportunity for abuse. On the government side, legal changes may also create uncertainty that hinders enforcement activities.[161]

The traditional response to the unintended criminogenic or corrupting effects of the law is to issue new legislation to close the loopholes created by statutory provisions, judicial statements, or enforcement practices. Targeted law reform might be necessary to neutralize the corrupting effects of specific juridical enablers—for instance, definitions can be made clearer, prohibitions can be made more stringent, and judicial confusion can be corrected by legislation. However, not only is this a retrospective measure, but the findings also suggest that such reform can itself act as an enabler of abuse. A more preventive, comprehensive, and diversified strategy addressing the legal environment as a complex and dynamic system should be in place. Such strategy should include a range of legal and non-legal situational measures intervening not only on the final and more visible outcomes of policymaking, lawmaking, and enforcement—legislation, judicial interpretations, and enforcement practices—but on the

[160] Morgan & Clarke, *supra* note 60, at 189.
[161] *See e.g.*, Pietro Molino, *VIRTEU National Workshop – Italy*, Session 1, video recording (April 29, 2021), at 21:39, www.corporatecrime.co.uk/virteu-national-workshop-italy (discussing how, in Italy, frequent legislative changes generate barriers to tax compliance through the creation of uncertainty and inconsistency in the approaches to tax enforcement from year to year).

methods and processes through which such outcomes are reached—that is, policy deliberations, legislative processes, and judicial and administrative decision-making.

A first step would be to promote awareness and understanding of the corrupting effects of juridical enablers among the key participants in the tax system, in particular finance ministries, legislators, the courts, and revenue authorities. This can be achieved through ongoing investment in research on the topic, training, continuing professional development, better dialogue between academia and policymakers, and the creation of special roles, task forces, or bodies within public institutions. These measures could help policymakers be more cognizant not only of the economic costs and benefits inherent in introducing new tax reliefs but also of the risks to the integrity of the tax system. Similarly, law drafters, judges, and tax authorities need to be more aware of the possible corrupting effects of their activities and their implications on the broader legal system.

More specific measures should address policymaking, lawmaking, and enforcement processes. Mechanisms to assess and mitigate the unintended risks of abuse entailed by proposed policies or legislation should be in place. Such mechanisms should include internal processes within relevant ministries and institutions, including tax authorities, involving permanent advisory bodies while also relying on external experts to assess the corrupting risks related to the design and implementation of new policies. An example is the COVID-19 Counter Fraud Response Team (CCFRT) established by the U.K. government to mitigate the fraud risks of stimulus spending during the coronavirus pandemic.[162] Special forms of crime and corruption risk assessment mechanisms—like those proposed by previous research and tested on EU tobacco regulation and employed by Eastern European legislators[163]—should be

[162] Lorenzo Pasculli, *Coronavirus and Fraud in the UK: From the Responsibilisation of the Civil Society to the Deresponsibilisation of the State*, 25, 2 COVENTRY L. J, 3, 12 (2020).
[163] Kotchegura, *supra* note 9, at 377; Tilman Hoppe, Anti-Corruption Assessment of the Laws ("Corruption Proofing") Comparative Study and Methodology 9, 9 (Nov. 2014).

embedded in legislative processes. These mechanisms include both a risk assessment phase and subsequent action to proof the proposed legislation against crime or corruption by closing any loopholes *before* it enters into force. Research on the structural relationships between general and special juridical enablers—individual and aggregate—as well as the potential criminogenic effects of intrinsic properties of the law and legal change should support these mechanisms. As for judicial decision-making, training and guidance should be provided to judges to help them assess and mitigate the potential corrupting and criminogenic effects of their statements and decisions. Such measures should not necessarily affect the outcome of the decision—but rather the way in which this outcome is delivered—for instance by adopting clear and unambiguous language, avoiding unnecessary complexity, reducing the length of judicial decisions, and flagging any potential unintended consequence of legislation that can only be addressed by statutory reform.

Additional measures should integrate these mechanisms to address, in particular, the corrupting effects of immutable properties of the law and legal changes. Self-interested rationalizations exploiting the natural malleability of the law can be countered through a better use of principle-based regulation[164]—although this study suggests that well designed rules are also important to reduce the risk of unintended corrupting effects. Better and more accessible communication from public authorities, in particular HMRC, including systematic and simplified explanations of judicial decisions, engagement with the media, and information and education campaigns surrounding the introduction of legal changes should counter motivations and rationalizations by demystifying the law and promoting integrity and compliance. The expansion of clearance mechanisms to require taxpayers to get the approval of tax authorities

[164] *See* Judith Freedman, *Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited*, 6 BRIT. TAX REV. 717, 717 (2010) (suggesting that principles-based legislation can be a solution to current tax law issues); *see also* John F. Avery Jones, *Tax Law: Rules or Principles?* 17, 3 FISCAL STUD., 63, 64 (1996) (arguing that principles can produce simpler and more certain legislation).

before adopting new avoidance schemes would also resolve some of the risks of abuse caused by the malleability of the law, but might be problematic in practice, as it would be extremely resource-intensive, slow, and perhaps wholly disproportionate.[165]

Future research should test the validity of our findings and the applicability of our theorizations to other jurisdictions and forms of crime and corruption, especially in a comparative perspective. More research is also required to establish a detailed catalogue of juridical enablers in the tax sector to support the individuation of effective preventive measures. Finally, the powerful and distinctive role of tax professionals and advisers in shaping the legal environment and in aggravating the effects of judicial enablers warrants careful attention both in subsequent research and in the work of professional organizations.

[165] Freedman, *supra* note 116, at 745 (outlining arguments against an advance clearance process).