

THE IMPORTANCE OF A COMMON DEFINITION OF TAX CRIME AND ITS IMPACT ON CRIMINAL COUNTERMEASURES IN THE EU: An explorative study

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Abstract

Tax crimes have continued to overreach legal clarity, enforcement certainty, fiscal performance and effective public policy in the European Union (EU). The criminal justice countermeasures that have been devised to confront the vitality, intransigence and impacts of tax crimes have consequently been far from being effective and efficient. Guided by the research outputs of an EU funded PROTAX, an advanced solution-hunting research project for tax crimes, this article identifies the uncertainties embedded in the definition of tax crimes in the legal frameworks across the EU Member States as one of the key impediments that weaken the resolve to fight against tax crimes in the EU effectively. By utilising empirical and comparative legal research, this article delves into the main gaps in the criminalisation of tax evasion behaviour. It urges for the development of new methods that can effectively counter tax crimes in the EU.

Keywords: Tax crime, criminal liability, countermeasures, EU, PROTAX.

Introduction

Across the EU Member States (MS), there is a huge gap between estimated revenues from taxes and the tax revenues that have actually been collected every year. For instance, the EU found that in 2017 the total VAT gap or compliance gap across the EU was about EUR 137.5 billion, representing 11.2% loss of the total VAT revenue expected in that year

(European Commission, 2019). From 2014, though there has been a continuous decline in the real VAT gap across the EU, the scale of the VAT gap is still significantly high (see European Commission 2020). Although factors such as 'administrative errors, bankruptcies, insolvencies and tax optimisation' also contribute to the scale of the compliance gap, tax fraud (particularly, VAT fraud) and tax evasion as tax crimes have been identified as part of the key contributory factors to this 'missing part' (European Commission, n.d.).

The EU has estimated that while loss from tax fraud and tax evasion 'stands up to EUR 1 trillion' every year (European Parliament, 2018), the total government debt for all the 27 EU MS stood at just EUR 514 billion in 2012 (European Commission, n.d.). This points out as just how EU MS' governments would still have been without any debts choking their economies and yet would still have had more extra revenues to undertake further socio-economic development had tax evasion and tax fraud been eliminated or at least mitigated. Aside from the fairness concerns and the threat to the single market, tax crimes indeed continue to pose serious stress to the budgets of the EU, and its MS. PROTAX case studies revealed that tax offences are rife, creating substantial damage to society (Turksen et al., 2018).

There have been many efforts to nip the situation in the bud. However, the problem of tax crimes persists. This paper contributes to the efforts that can make a unique difference in countering the problem by leveraging outputs of EU-funded project, PROTAX (www.protax-project.eu) which the author is currently leading, to highlight the need for a common definition of tax crimes in the EU in light of criminal law enforcement.

The PROTAX project

PROTAX is aimed at creating a toolkit to harmonise the prosecution of tax crimes and enhance information sharing across the EU. The motivation of the project is anchored on the considerable scale and socio-economic impact as well as policy concerns, and law enforcement deficits in countering tax crimes in the EU. The need to address these, as reflected in the EU policy priorities, including the financing of research projects in this direction, is a more significant motive for PROTAX. Identification of knowledge gaps and providing tested methods to fix them are critical pillars that support the course of action to achieve motivation. To this end, PROTAX project generates a variety of tested solutions such as building a legally sound and effective prevention and prosecution methods for countering tax crimes, with a focus on the development of cohesive approach of law enforcement in the EU.

The project uses a multidimensional methodology, which combines empirical and theoretical research, including review and synthesis of relevant academic literature, the use of doctrinal and comparative legal analysis, and stakeholder engagements such as focus group discussions and conferencing. Both top-down and bottom-up approaches are

used in information gathering and analysis, ensuring that micro and macro-level concerns/needs and solution dossiers on countering tax crimes are effectively catered for. The PROTAX research is ongoing and has already generated massive datasets worth considering by law enforcement personnel and researchers.

This paper provides some pertinent insights into PROTAX deliverables (particularly in respect of PROTAX reports for 2018 and 2019). It leverages that to make novel deductions/conclusions, which are analytically drawn and made more suitable for use by law enforcement researchers and related audience. Specifically, the paper analyses the relationship between tax evasion and tax fraud (tax crimes) and criminal countermeasures in the EU MS while exploring the need for a common definition of tax crimes in the EU.

Approach

The paper employs doctrinal, socio-legal and comparative research methodologies to study the different definitions and consequences on law enforcement against tax crimes across EU MS. The legal parameters of this multidimensional approach to legal research are mainly confined to European jurisdictions such as Austria, Czech Republic, Estonia, Finland, Germany, Ireland, Malta, Portugal and the United Kingdom, which have significant differences as far as their respective tax enforcement eco-systems are concerned.¹

Defining tax crimes

Tax crimes are common yet difficult to measure (Feria, 2020). Despite its prevalence, neither the EU nor the OECD has clearly defined tax crimes. OECD has attempted to define tax crime as tax fraud identified as, 'a form of deliberate evasion of tax which is generally punishable under criminal law... [and that it] includes situations in which deliberately false statements are submitted, fake documents are produced, etc.' (OECD, n.d.; Vlcek, 2019). This definition of tax fraud is casually (not legislatively) adopted by the EU (European Commission, n.d.). EU is yet to have a unified definition of tax crimes in its *acquis communautaire* (Thirion and Scherrer, 2017)² as it has been difficult to achieve consensus among its MS (Suso, 2014).³ The EU also 'casually' defines tax evasion 'as any conduct by taxpayers that involves fraud on tax payments that are owed to the State and for which the law recognises as a criminal conduct' (European Commission, n.d.).

¹ Nevertheless, references are also made to criminal law of other EU Member States.

² Thirion and Scherrer (2017) opine that 'the distinction between administrative tax offences and criminal tax offences is often blurred at Member State level and it is sometimes unclear whether these two types of sanction are complementary or conflicting' (p.8).

³ It should be noted that the FIUs in the EU have reported difficulties in exchanging information based on differences in national definitions of certain predicate offences, such as tax crimes, which are not harmonised by Union law. See Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, para. 18.

These two terms (fraud and evasion) are intertwined and characterise essential taxonomies of tax crimes in the EU. The most common behaviours across the chain of tax offences in almost all the EU MS are that of fraud and dishonesty (Suso, 2014). Nevertheless, these require a unified definition with proper expression in EU law to be more effective by law enforcement agencies (LEAs). See the varied connotations of these behaviours in Table 1 below:

Table 1: Examples of divergent connotations of tax offences in selected European jurisdictions

Austria	Tax evasion (Article 33 of the Fiscal Offences Act 1958)
	Tax fraud (Article 39 of the Fiscal Offences Act 1958)
Czech Republic	Evasion of taxes, fees and similar compulsory payment (Section 240 of the Penal Code 2009)
	Evasion of taxes, social security insurance fee and similar compulsory payment (Section 241 of the Penal Code 2009)
Estonia	Concealment of tax liability and unfounded increase of claim for refund (§ 389 of the Penal Code 2001)
Finland	Tax Fraud (Section 1, Chapter 29, of the Penal Code 1889)
	Aggravated tax fraud (Section 2, Chapter 29, of the Penal Code 1889)
	Petty tax fraud (Section 3, Chapter 29, of the Penal Code 1889)
Germany	Tax Violation (Section 4, Chapter 29, of the Penal Code 1889)
	Tax crimes (Section 369 of the Fiscal Code 2002)
	Tax evasion (Section 370 of the Fiscal Code 2002)
Ireland	Revenue Offences (1078 of the Taxes Consolidation Act 1997)
Malta	Fraudulent subtraction of tax payments (Article 11 of the Legislative Decree no. 74/2000)
	Penal provisions relating to fraud, etc. (Article 52 of Chapter 372 – Income Tax Management Act 1994)
Portugal	Tax Scam (Article 87 of the General Regime of Tax Infringements)
	Tax Fraud (Article 103 of the General Regime of Tax Infringements)
United Kingdom	Conspiracy to defraud (Common law offence preserved by the Criminal Law Act 1977, s5(2))
	Cheating the Public Revenue (Common Law offence, preserved by Theft Act 1968, s32(1)(a))
	Untrue Declarations (Customs and Excise Management Act 1979, s167)

Source: PROTAX: (Rasmouki et al., 2019)

In establishing essential tax behaviours or elements that characterise a criminal activity Directive (EU) 2018/1673 (sixth AMLD) re-emphasises the ‘unavoidable’ space that arguably should be created in EU law to accommodate divergence of definitions of tax crimes in national law (Recital 8). This is due to differences in what ‘constitutes a punishable criminal activity by sanctions’ (Recital 8) in each EU MS against tax crimes provided for by the Anti-Money Laundering Directives (AMLD) of the EU and the regulatory frameworks of Financial Action Task Force (FATF, 2012-2019;p.115).

Indeed, the sixth AMLD of the EU does not seek ‘to harmonise the definitions of tax crimes in national law’ (Recital 8). Articles 2(1) (q) and 3(1) of Directive (EU) 2018/1673 affirm the criminalisation of tax offences based on national law. The relevant tax crime definitional provisions in Directive (EU) 2018/1673 build upon a series of preceding legal instruments including in particular Recital 11 and Article 3(4)(f) of Directive (EU) 2015/849.

However, fraud against the financial interests of the EU and its MS has increasingly received a common definitional approach in the EU’s *acquis communautaire*. These find expression in Directive (EU) 2017/1371 and Directive (EU) 2018/1673. In fact, since the coming into being of the Convention on the protection of the European Communities’ financial interests in 1995, supplementary instruments have been drawn to contribute to the harmonisation of the legal definition of fraud. Directive (EU) 2017/1371 and Directive (EU) 2018/1673 are essentially the latest of the EU legal instruments that have given clarity to the drive for a common definition of fraud especially relating to VAT fraud against EU financial interests and its MS.

Thus, it may be pertinent to produce an EU definition of tax crime (tax fraud and evasion in particular) in line with the EU definition of VAT fraud under Article 3(2)(d) of Directive (EU) 2017/1371 which has fairly established clearer parameters of VAT fraud.

Assessing the impact of tax definitions on law enforcement

One of the key differences between national tax systems stems from the nature and the definitions of tax crimes in each EU Member State (Turksen et al., 2018). In most EU countries, tax offences are qualified as criminal and/or administrative offence, depending on the classification given under each legal system (Rasmouki et al., 2019). Therefore, the notion of ‘tax crime’ falls within the broader notion of ‘tax offence’⁴ which is also designated as a predicate offence under anti-money laundering regulations. Despite this classification, tax crimes are dealt with by multiple and/or parallel procedures *inter alia*, civil,

4 Tax offences may include *inter alia* cheating or defrauding the public revenue; deliberately creating or providing false documentation in tax returns and/or misrepresentation of financial information or dishonest tax recording, accounting or auditing; failing to declare taxable income or trade; aiding abetting, facilitating tax evasion; claiming fabricated tax returns. Tax offence (fraud) can also happen when VAT is charged on a product, but that tax is not paid to the government and is instead stolen by the fraudster. This is known as Missing Trader Intra-Community Fraud (MTIC), or carousel fraud.

administrative or criminal laws. These different enforcement approaches to tax offences could have an impact on judicial cooperation in criminal matters whereby the criminal conduct could be qualified as administrative (civil law) tax offence in some countries and criminal offence in other legal systems (Turksen et al., 2018). Subsequently, this can have detrimental effects on cross-border cooperation between law enforcement agencies since the existing cooperation mechanisms provided to mitigate the situation do not appear to cure the difficulties brought by these dichotomies.

It is evident that national legislators have preferred administrative sanctions for punishing tax violations as expertise of administrative authorities and the structure of administrative procedures often make the imposition of fiscal/financial sanctions faster and more effective. In tandem with this general trend, criminalisation of tax offences⁵ and criminal sanctions (which often include deprivation of liberty by a prison sentence) are imposed to punish serious tax crimes which arguably warrant more serious deterrence (Turksen et al., 2018).

In spite of this distinction between criminal and administrative offences, the jurisprudence of the Court of Justice of the European Union and European Court of Human Rights (ECtHR) extends safeguards in criminal matters to the proceedings imposing administrative sanctions considered 'criminal' in the light of the *Engel* criteria (ECtHR, 8 June 1976, *Engel and others v. the Netherlands*, Appl. No. 5370/72). This interpretation has also been extended to tax matters. More specifically, the proceedings for the imposition of tax surcharges formally qualified as administrative in the domestic legal systems have been considered by the ECtHR as 'criminal' for Article 6 (Right to a fair trial), Article 7 (No punishment without law) and Article 4 Prot. No. 7 (Right not to be tried or punished twice) ECHR. For instance, in the *Jussila* case, the ECtHR has considered a surcharge of about EUR 300 as 'criminal' within the autonomous meaning of Article 6 of ECHR (ECtHR, 23 November 2006, *Jussila v. Finland*, Appl. No. 73053/01, §§ 29-39).

Depending on the national system, criminal and administrative sanctions may be applied alternatively or jointly (Rasmouki et al., 2019); as already underlined by the Advocate General Villalón, 'the imposition of both administrative and criminal penalties in respect of the same offence is a widespread practice in the Member States' (Opinion of Advocate General Villalón delivered on 12 June 2012, *Åklagaren v Åkerberg Fransson*, § 70). However, the combined imposition of such sanctions raises serious issues concerning the respect of the right not to be tried or punished twice for the same offence and the principle of proportionality that have been addressed by various decisions of the European and domestic Courts.

⁵ Inclusion of tax offences as a predicate offence to anti-money laundering regime is required by EU Law which has been driven by the implementation of the FATF Recommendations (FATF, 2012-2019).

Moreover, each jurisdiction in the EU defines tax crimes differently according to their respective criminal laws. Such a distinction primarily impacts the criminalisation of behaviours involved in tax crimes whereby a person may be liable under criminal law only if and where conduct falls under the definition of a specific offence. Moreover, it also impacts on the treatment of the crime, burden of proof and the proceedings for various tax crimes. The key aspects for further analysis are the legal sources of definitions, the definitions of the constitutive elements of tax crimes, and the impacts of these different definitions in the fight against tax evasion at national and EU level.

As far as the sources of the definitions are concerned, there is a tendency in the EU Member States to codify tax crimes through legislation both in civil and common law jurisdictions. The sources of tax crimes within a given jurisdiction are, however, multiple whereby in nearly all MS, there are generally numerous legal instruments addressing tax crimes which have implications for the definition thereof. In common law jurisdictions, although certain crimes derive from common law such as the common law offence of cheating the public revenue (Alldridge, 2017:p.53), tax offences are defined in statutes also. For example, the main tax crimes in Ireland, Section 1078 (*Revenue offences*) of the Irish Taxes Consolidation Act 1997 and Section 106A (*Offence of fraudulent evasion of income tax*) and in the UK, the English Taxes Management Act 1970 and/or false accounting offences under Theft Act 1968 or the Fraud Act 2006 stipulate various tax offences. Furthermore, tax authorities and judges also contribute to the definition of tax crimes in the different national legal systems. These must comply with the principle of legality in criminal matters in their activity of interpreting the text of tax crimes.

Concerning the last point, the ECtHR stated that the principle of legality under 'Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'. The applicants may have fallen victim to a novel interpretation of the concept of 'tax evasion, but it was based on a reasonable interpretation of Articles 198 and 199 and 'consistent with the essence of the offence'. The Court conclude[d] that there was no violation of Article 7 on account of the applicants' conviction under this head (ECtHR, 25 July 2013, *Khodorkovskiy and Lebedev v. Russia*, Appl. §§ 791-821).

By considering the definitions of tax crimes in each legal system as a whole,⁶ a distinction can be made between countries that adopt a few law provisions containing multiple definitions of tax crimes and countries that adopt multiple provisions, each defining tax crimes. A case where a single provision may provide for a plurality of definitions of tax

6 PROTAX examined 17 European jurisdictions and analysed legal provisions that apply to tax crimes. See, PROAX D3.1.

crimes is the Section 1078 Taxes Consolidation Act 1997 (*Revenue offences*) in Ireland. Paragraph 2 of this provision includes an extensive list of behaviours that may give rise to tax offences (e.g., from ‘(a) knowingly or wilfully delivers any incorrect return, statement or accounts or knowingly or willfully furnishes any incorrect information in connection with any tax, (...)’ to ‘(j) obstructs or interferes with any officer of the Revenue Commissioners, or any other person, in the exercise or performance of powers or duties under the Acts for the purposes of any tax’.

As regards the contents of the definitions, the first differences relate to the identification of persons who may be punished for committing tax crimes. Certain countries only provide for the liability of individuals. For example, Germany has not yet introduced a corporate criminal liability, unlike many other EU countries. Other countries also establish the liability of legal entities: this is the case, for example, in the Czech Republic (Act No 418/2011 Coll., on Criminal Liability of Legal Entities and Proceedings against Them with reference to Retrenchment of Tax, Duty or any Other Similar Mandatory Payment under Section 240 of the Penal Code and Evasion of Tax, Social Security Insurance and any Other Similar Mandatory Payment under Section 241 of the Penal Code), Estonia (liability of legal entities for the concealment of tax liability and unfounded increase of claim for refund under Section 389(3) of the Penal Code), and United Kingdom (corporate offence of failure to prevent the criminal facilitation of tax evasion under Sections 45 and 46 of Part 3 of the Criminal Finances Act 2017).

A further distinction emanates from the constitutive elements of tax crimes. As for the objective element, tax crimes generally constitute breaches of tax obligations having heterogeneous contents across different legislation. Since the scope of the criminal provisions is affected by the tax rules, the main challenge to harmonise criminal sanctions depends on the harmonisation of fiscal policies at the EU level. The different formulations make the comparison of the legislative data much more difficult. Different titles used to identify tax crimes further complicates the comparative analysis. There are countries in which the titles are simpler. For example, Articles 33 and 39 of the Austrian Fiscal Offence Code (*Finanzstrafgesetz*) criminalise ‘Tax evasion’ (*Abgabenhinterziehung*) and ‘Tax fraud’ (*Abgabenbetrug*). Vice versa, there are other countries where the terms to identify the typology of tax crimes are more complex. For example, the ‘Concealment of tax liability and unfounded increase of claim for refund’ (*Maksukohustuse varjamine ja tagastusnõude alusetu suurendamine*) under Article 389 of the Estonian Penal Code (*Karistusseadustik*) is not easy to comprehend and apply even for experienced law enforcement agency staff (Rasmouki et al., 2019).

Moreover, EU MS adopt different approaches in identifying a tax offence and thresholds based on which such behaviour can be categorised as a crime under penal law (OECD, 2017:p.15; Rasmouki et al., 2019). These thresholds for criminalising a specific behaviour

are sometimes articulated in a general manner or in detail. These approaches have both strengths and weaknesses. The general definitions' capture a wide range of activities such as criminal actions that intend to defraud the government' (OECD, 2017:p.15) but appear to raise issues of respect of legality according to which tax crimes should be expressed with adequate precision and clarity. On the contrary, offences defined in more detail are more in line with the principle of legality because they include 'precise actions that constitute a crime' (OECD, 2017:p.15), but can lead to the impunity of non-criminalised offensive conducts.

As far as the mental element is concerned, even though tax crimes usually need a motive and/or an intention, in particular legal systems 'negligence is a sufficient subjective element (*mens rea*) to constitute the offence.' (Thirion & Scherrer, 2017:p.24). It is worth noting that many prosecutors indicated that demonstrating an intention to evade tax is often problematic for prosecutors and that there is a need to review threshold regimes (Rasmouki et al., 2019). Further variations of treatments concern the incitement, aiding and abetting, and attempt cases (Turksen et al., 2018).

With regard to the responsibility of companies, the distinctions concern, among other things, the entities subject to corporate liability, the types of tax offences arising corporate liability and the criteria for ascribing subjective liability. For example, in the UK, the legal framework goes even further to create a 'strict liability' offence whereby a company may be found guilty of tax evasion if they fail to prevent the facilitation of UK tax evasion and/or fail to prevent the facilitation of foreign tax evasion (Part 3 Criminal Finances Act, 2017).

The type and severity of sanctions imposed on tax crimes (fines, imprisonment, disqualification measures, confiscation, etc.) can vary significantly from one country to another (Rasmouki et al., 2019; Thirion & Scherrer, 2017:48-49; Seer & Wilms, 2016). These variations can influence not only divergences of law enforcement perception but also perception and movement of taxpayers to the most favoured/lenient jurisdictions - thus posing a threat to LEAs chasing tax offenders from one jurisdiction and destination LEAs having to deal with an influx of taxpayers with potential to undermine the integrity of the tax system (Rasmouki et al., 2019).

As a result of these diverse differences, 13 case studies conducted by PROTAX from 10 European jurisdictions (Turksen et al., 2018) established that the following complex methods used by high net worth individuals, transnational companies and organised criminal organisations to commit tax crimes were more likely to succeed beyond the enforcement capacity of some. These include the use of shell companies (missing trader), trusts, professional enablers, VAT carousel, profit shifting, and free ports (Turksen et al., 2018). While nearly all of these cases made use of enablers, about two-thirds of the cases (*R v Cahuzac*;

R v Shanly; and R v Hoeness) included tax havens and/or secrecy jurisdictions (Remeur, 2018), which allow the other complex methods to flourish. For many of these methods, ensuring clarity of offences, transparency and robust mechanisms could help mitigate the challenging terrain they provide for law enforcement. It is evident that greater protection for whistleblowers harnesses transparency and facilitates the detection of tax crimes (Turksen et al. 2018). Thus, the EU Directive (EU) 2019/1937 (Whistleblower Protection Directive) is a welcome development in this regard (Rasmouki et al., 2019).

It is generally accepted in criminal law in EU MS that blameworthiness and subsequent punishment should vary depending on whether the actor violated the law purposely, knowingly, recklessly, negligently, or non-negligently. However, when it comes to tax crimes, both the EU and its MS tend to rest culpability for the criminal act of tax fraud on the amount involved. In other words, the seriousness of the offence often depends on the money involved not merely on *mens rea* (guilty mind) or *actus reus* (guilty act).

The result of this approach is that illegality does not equate to criminality. Furthermore, almost exclusively across the EU, the impact of a tax crime is looked at as a revenue loss and the distorting effect it has on competition among businesses and intra-community trade is given scant attention. Tax crimes fuel taxpayers' inequity and often subsidise serious organised criminal activities (Feria, 2018). Current countermeasures are designed to minimise revenue costs rather than deal with fraud and the drivers of fraud. Under these circumstances, LEAs have to be more tactical and analytical in employing technology and cooperation to effectively rope in the extent of tax offenders that can be captured by the existing countermeasures. At the same time, LEAs need to build more persuasive architecture for enticing the minds of policymakers who may still not see the need to effectively balance the pursuit between revenue and criminal enforcement to enhance the integrity of the tax system.

Can existing cooperation mechanisms salvage the situation?

It must be noted that despite the existence of definitional differences of tax crimes among EU MS, the EU has strenuously and perhaps idealistically provided a number of legal instruments and several cooperation mechanisms to mitigate the effects of lack of tax crime definitional harmony on law enforcement. For instance, Directive (EU) 2018/843 (Recital 18; Articles 1(31-32)) and the above legal instruments, including Recital 11 and Article 57 of Directive (EU) 2015/849, do recognise the lack of harmonised rules and entreat EU MS to endeavour to cooperate and not allow the differences in tax definitions to impede the fight against tax crimes. At the same time, the Council Regulation 2010/904/EU of 7 October 2010, has provided for the use of simultaneous controls (Articles 29-32, in particular) and respect for the Eurofisc system (particularly, Article 33) aimed at fostering

cross-border cooperation of EU MS in criminal matters especially those relating to VAT. The Council Directive 2011/16/EU of 15 February 2011 provides for cooperation mechanisms on direct taxation on administrative terms but with consequences on criminal cooperation on law enforcement. However, these mechanisms have still not fully actioned or enforced and arguably cannot effectively fill the considerable gap provided by the lack of harmonised definitions of tax crimes in the EU.

For instance, Recital 18 of Directive (EU) 2018/843 cites the reported difficulties faced by Financial Intelligence Units (FIUs) in criminal tax information-sharing between them due to the 'differences in national definitions of ... tax crimes'. This provision (Recital 18) goes to urge MS not to allow these differences to hinder cooperation in criminal law enforcement. However, PROTAX focus group discussions encountered repeated instances across the 10 European jurisdictions of the difficulties faced by LEAs in exchanging information. For instance, linguistic barriers and differences in degrees of criminalisation and/or threshold for tax offences to become a criminal activity came up as impeding speedy cross-border information exchange on countering tax crimes. So, for example, thresholds of tax offences between Bulgaria (EUR 1,500 for large-scale tax obligations) and Italy (EUR 100,000) were found to significantly differ (Reger, 2020). Panayi (2015) has highlighted the extent to which this lack of unified definition of tax crimes (Turksen, 2018) does adversely affect law enforcement action and even in the adjudication of tax cases in the CJEU (Panayi, 2015; Turksen et al., 2018).

While LEAs ideally would require these encumbrances to be eliminated, they, in the meantime, should leverage the cooperation mechanisms provided by the current EU legal arrangement such as exploiting the joint investigation teams and mutual legal assistance through greater transparency, mutual understanding, and effective and efficient communication between LEAs. In consolidating any gains and addressing existing weaknesses, it is imperative that these processes gradually yield to a system where there would be solid grounds upon which criminal tax offences can be commonly identified by actors across the criminal justice system.

Conclusion

The different definitions of tax crimes impact on the repression of tax evasion behaviour at a national and EU level. The EU has recently required MS to criminalise VAT fraud through the Directive (EU) 2017/1371 with the consequent introduction of a minimum common definition for this type of crime (Juszczak & Sason, 2017). However, what seems like a discretionary requirement under this directive - the threshold of EUR 10 million before a tax offence should become a crime - may be seen as a soft touch and hinders the aim to criminalise tax offences.

Despite these notable and nominal steps forward, the issue of common definitions of tax offences remains a central issue in combating tax evasion in the EU. On the one hand, the criminalisation of tax law violations aims to ensure the taxpayers' compliance with legal obligations whilst securing the availability of criminal investigative and enforcement powers (OECD, 2017:p.14). This impacts on tax revenue, thus also economic development, fair competition and social cohesion across the EU.

Although the EU has strengthened the instruments of judicial cooperation in criminal matters in general, and with tax offences in particular,⁷ the different definitions of tax crimes and the lack of common legal base hinder the effectiveness of countermeasures.

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⁷ For example, Article 4(1) of Council Framework Decision 2002/584/JHA provides that 'if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State.'

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